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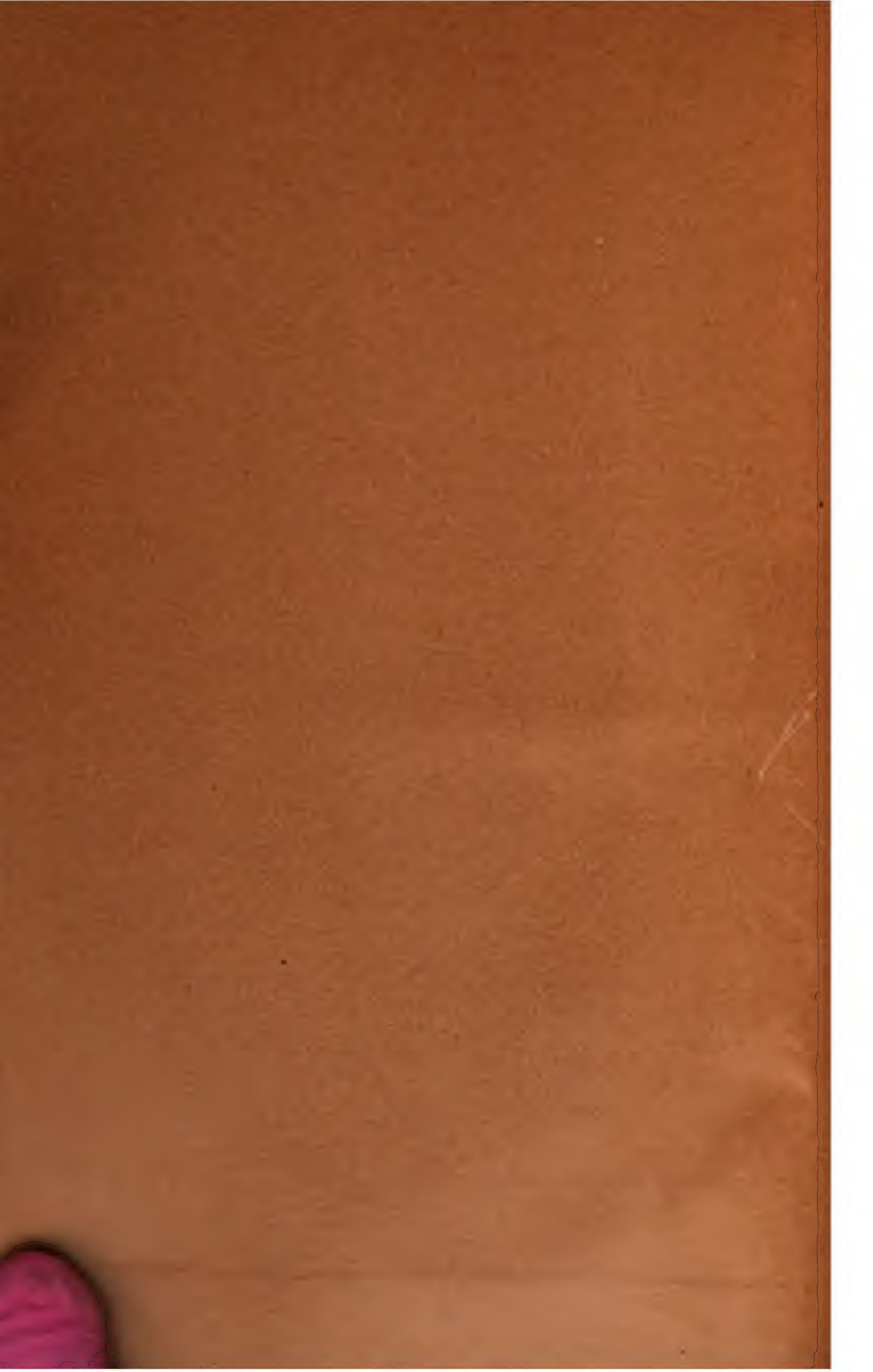
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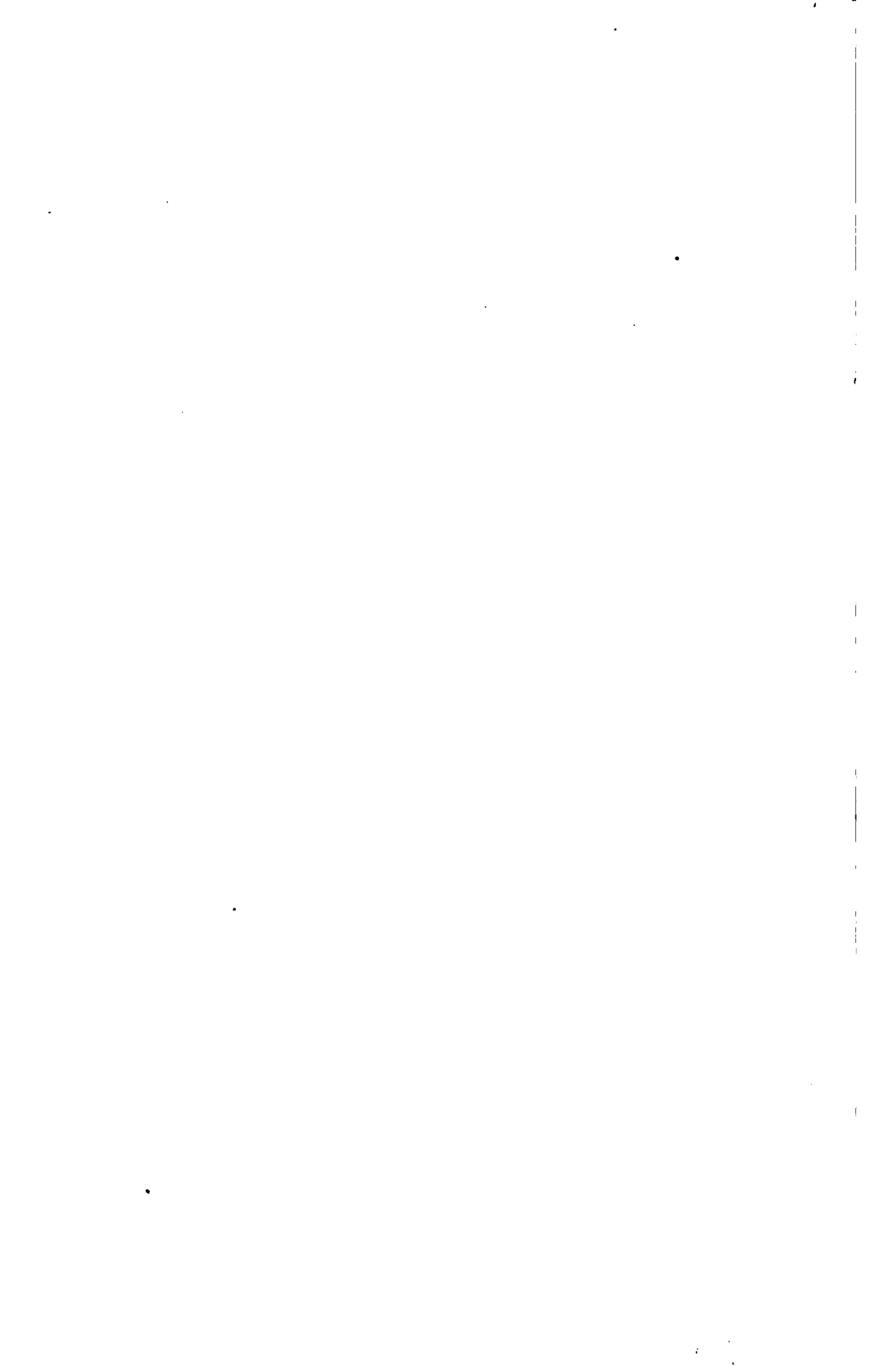
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REPORTS OF CASES

ADJUDGED IN THE

HIGH COURT OF CHANCERY,

BEFORE THE

RIGHT HON. SIR GEORGE JAMES TURNER,  
VICE-CHANCELLOR.

---

By THOMAS HARE,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

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VOL. IX.

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**ERRATUM.**

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# REPORTS OF CASES,

ADJUDGED IN THE

## High Court of Chancery,

BEFORE

THE RIGHT HON. SIR GEORGE JAMES TURNER, KNT.,  
VICE-CHANCELLOR.

COMMENCING IN

EASTER TERM, 14 VICT. 1851.

1851.

MARKER v. MARKER.

April 17th &  
23rd.

**T**HE Plaintiff *Thomas John Marker* was the tenant for life of the *Combe* property, (upon which was the timber in

The Court, by applying the doctrine of equitable

waste, controls and restrains the excessive use of the legal power incident to an estate unimpeachable of waste, but with reference only to the presumed will and intention of the party by whom the power was created.

In the preservation of ornamental timber the protection of the Court is confined to timber planted and left standing for shelter or ornament; and the question, whether the protection should be extended to particular timber, is, therefore, one of fact, and the determination must depend upon the evidence which can be collected to establish the fact.

The case of a trust or restriction created for the preservation of ornamental timber, is not like a trust for purposes of benevolence (as to which the objects are unlimited, and no standard can be found), but, *semble*, is a trust or restriction which the Court will endeavour to execute or enforce.

There are cases in which the Court may execute a trust for the application of money to purposes of taste or ornament, and, in doing so, may, in the absence of any prescribed standard, or if the standard be more or less indefinite, act upon the opinions of persons who are consulted by others in such matters, as it acts in other cases upon the opinions of persons of science—*Semble*.

Where a tenant for life without impeachment of waste had sold a quantity of timber trees, which the Court afterwards restrained him from felling, on the supposition that it would be equitable waste, the Court held that the purchasers of the timber were not necessary parties to the injunction suit, but required the Plaintiff to give security to the Defendant, not only for the value of all the trees which the Defendant should be prevented from cutting by the injunction, but also for any loss or damage the Defendant might incur or sustain by reason of his being prevented from completing the sale.

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question), expectant on the determination of the estate of the Defendant *Henry William Marker*, the tenant for life in possession, and upon the determination of an estate tail limited to the second and other sons of the same Defendant.

The two other Plaintiffs, *Richard* and *John Marker*, were the infant sons of *Thomas John Marker*; *Richard* was the tenant for life next in succession to his father, and *John* was the tenant for life in succession to *Richard*, in default of male issue of the latter. *Margaretta Marker*, the mother of the adult Plaintiff and of the Defendant in possession, by the settlement under which all the parties derived their title, limited the manors, capital and other messuages, tenements, farms, lands, advowsons, rectories, and other hereditaments comprised in the settlement, (including the *Combe* property) to *Samuel Kekewich* and *James Pulman*, their executors, &c., for a term of 1000 years, upon trust to raise one sum of 10,000*l.* for the settlor *Margaretta Marker*, and two other sums of 10,000*l.*, after her decease, for her son and daughter *Thomas John Marker* and *Margaret Frances Smith*. The words in which this trust was expressed, are stated in the judgment (a). The rights which were conferred by this trust, and the mode of carrying it into execution, were, after the death of *Margaretta Marker*, the subject of litigation in several forms.

A suit was instituted by the infant Plaintiff *Richard Marker* against the trustees and the other parties interested, to restrain the trustees from raising the three sums of 10,000*l.* by sale or mortgage of the settled estates, until the timber thereon, of ripe and full growth, should have been first sold and applied. To this bill demurrers were allow-

(a) See p. 8, *infra*.



ed (a). In December, 1850, the Defendant *Henry William Marker* advertised 700 oak trees and 100 ash trees on the *Combe* estate, for sale; and the trustees of the term filed their bill to restrain the proposed sale by the Defendant until the trust monies had been raised. This motion was refused (b). The present bill was filed on the 22nd of March, 1851, to restrain the felling of the timber, on the ground of its ornamental character. On the motion for the injunction, affidavits were filed on both sides, the result of which is stated in the judgment.

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Mr. *Rolt* and Mr. *Fooks*, for the motion.

Argument.

Mr. *Bethell* and Mr. *Giffard*, for the Defendant *Henry William Marker*.

The excepting clause in the settlement, purporting to abridge the power of the tenant for life, is too vague and indefinite to be enforced by this Court. The Court will not undertake to decide whether a particular tree or group of trees does or does not accomplish an ornamental purpose. That, Lord *Eldon* says, is a question "which cannot safely be trusted to the Court:" *Marquis of Downshire v. Sandys* (c). The Court has refused to restrain the cutting of timber, not more specifically protected than by the description that it might "contribute to ornament:" *Wilkins v. McNamara* (d). A tenant for life without impeachment of waste may cut anything which is timber; *Smythe v. Smythe* (e); and in order to bring trees within the protection of the Court, in such a case, it must be shewn that they were planted with a view to ornament, or left by design with a

(a) See *Marker v. Kehewich*, 8 afterwards granted the injunction.  
Hare. (c) 6 Ves. 107, 110 c.

(b) On the motion in *Kehewich* (d) 8 Ves. 70.  
*v. Marker*, the Lord Chancellor (e) 2 Swanst. 251.

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purpose of ornament or shelter to the mansion, by a party having power to cut them. The word "ornament" therefore has, from the necessity of the case, acquired in equity a technical meaning, which may possibly be very different from its real meaning. The Court thereby, without adopting or attempting to arrive at any abstract standard of taste, seeks the definition, which the acts and language of the settlor of the property afford, of the term "ornamental," and carries his directions into effect according to that definition: *Wombwell v. Belasyse* (a), *Chamberlyne v. Dummer* (b), *Lushington v. Boldero* (c), *Burges v. Lamb* (d), and *O'Brien v. O'Brien* (e).

This case is analogous to those of expressions of trust, which the Court has always refused to execute,—as for example, in cases of charitable gifts, where the bequest is made for objects conducive to virtue, or to morality, or other objects of a like indefinite character. The terms are in this case more loose and incapable of execution than they were in *Marquis of Downshire v. Lady Sandys*. The trees to be protected are not merely those which might be ornamental, when viewed from a certain spot or from a limited space, but ornamental to the house, out-buildings, or offices thereof, or the pleasure grounds attached thereto, or any of the views and prospects of the same. The Plaintiffs have entirely failed to shew that any of the trees in question were either planted for ornament or left with the design of ornament. The affidavits on behalf of the Defendant shew, on the contrary, that as to some of the trees the settlor herself had intended that they should be felled. The Plaintiff *Thomas John Marker* had known of the intention to sell the trees, long before the sale was made. The Plaintiffs

(a) 6 Ves. 110, n. (a).

(b) 1 Bro. C. C. 166; *S. C.*, 3 Bro. C. C. 549.

(c) 6 Mad. 149.

(d) 16 Ves. 174.

(e) Amb. 107. The cases are collected in Drewry on "Injunction," pp. 142 et seq.

in the suit of *Kekewich v. Marker* have represented these trees as in fact not ornamental. The motion to restrain the sale on the grounds then adduced had been refused, and the sale has therefore in fact been allowed to take place under the sanction of the Court. The Court would not entertain a motion which came so late, where the Defendant had been allowed to enter into contracts that might involve him in extensive liabilities, if he were not suffered to complete them, and where the representation of the character of the timber was directly the reverse of that which had been made by the same Plaintiffs or parties in the same interest in the former proceedings. The purchasers of the timber, moreover, ought to have been made parties, as they are materially interested in the question; and the Court would not in their absence make an order by which they might be seriously prejudiced, and prevented from performing contracts, into which they might have entered upon the faith of the timber being delivered to them. The cases of *Mann v. Stephens* (a) and *Tulk v. Mozhay* (b) were cited.

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Mr. Rolt, in reply.—The direction by the settlement to retain enough of the most ornamental timber to preserve the beauty of the place, affords sufficient evidence that the settlor then conceived that there was timber then existing on the property which was ornamental; and it clearly amounts to a direction that such timber shall be left for ornament. The purchasers are not necessary parties. It is not the rule of the Court to require that persons, thus indirectly affected by the restraining of an illegal act, should be heard or represented in the suit; nor, in a case of waste, is an objection for want of parties any ground for refusing the injunction: *Const v. Harris* (c).

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(a) 15 Sim 377.

(b) 11 Beav. 157

(c) T. & R. 514.

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## The VICE-CHANCELLOR:—

This was a motion, on the part of the Plaintiffs, for an injunction to restrain the Defendant *Henry William Marker*, his servants, workmen, and agents, from cutting down or felling, or permitting to be cut down or felled, 700 oak trees, marked progressively 1 to 700, or any other trees growing on the estates in the bill mentioned, which afford or give protection, shelter, or ornament to *Combe House*, or the buildings or offices thereof, or the pleasure-grounds attached thereto, or any of the views and prospects of the same.

The trees in question are standing upon an estate at *Gittisham*, in the county of *Devon*, consisting of about 1700 acres, and on which the mansion-house, called *Combe House*, is built. It appears to be an old mansion-house, situate on the slope of a hill, and built in the Elizabethan style, with a terrace front, and with shrubberies and pleasure-grounds attached to it. The hill rises gradually at the back of the house; and there are, upon the rise of the hill, three woods, called the *Cross Park Wood*, the *Combe Wood*, and the *Kennel Copse*, which form a belt or boundary to the pleasure-grounds, and contain together about thirty-three acres. Above these woods there is a range of sheep pastures, and the higher summit of the hill is again clothed or fringed with wood. There is a footpath leading from the mansion-house, through the *Cross Park Wood*, to the rectory-house and grounds; and this footpath is bounded by laurels and hollies. There are two rookeries in the *Combe Wood* and the *Kennel Copse*; and the farm-buildings lie at the back of the *Combe Wood*. Of the 700 oak trees now proposed to be cut, 500 are standing in the three above-mentioned woods. Some few of them form part of the rookeries; a few others immediately adjoin the rectory footpath; and the rest are trees, standing either separately or together in small numbers, in different parts of the woods. The re-

maining 200 oaks stand either in hedge-rows or in the inclosed fields or open lands forming part of the estate. Eleven of these trees are described as standing in an elevated position above a small orchard which adjoins the lawn, and as being in view of the mansion and its approaches; and five others of them are described as being in a field adjoining a public road, running through the property from the village of *Gittisham* to the rectory, but not in view of the house. The position of the rest of the 200 oaks does not appear by the affidavits.

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The mansion and lands at *Gittisham* form part of a large estate, called the *Combe* estate, which was formerly the property of *Thomas Putt*, and contains about 4000 acres. *Thomas Putt* died in the year 1787, having by his will devised the estate to uses in strict settlement. From the time of his death until the 24th of August, 1844, the estate was held by several tenants for life in succession, whose estates, under the limitations of his will, were unimpeachable of waste. On the 24th of August, 1844, *Margaretta Marker* came into possession of the estate as tenant in tail. She duly barred the entail in the estate, and by a deed dated the 11th of October, 1844, resettled it, in consideration of natural love and affection, to the use of the Defendants, *Kekewich* and *Pulman*, for the term of 1000 years, without impeachment of waste, save only the cutting and felling of ornamental timber as thereafter mentioned; and after the determination of the said term, and in the meantime subject thereto and to the trusts thereof, to the use of herself, the said *Margaretta Marker*, for her life, without impeachment of waste, save only the cutting and felling of ornamental timber, as thereafter mentioned; with remainder to the use of the Defendant *Henry William Marker*, for life, without impeachment of waste, save as aforesaid; with remainder to the use of a son of the Defendant, who is since dead without issue, for life, without impeachment of waste, save as

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aforesaid; with remainder to the first and other sons of *Henry William Put Marker*, and to the second and other sons of *Henry William Marker* successively, in tail male; with remainder to the use of the Plaintiff *Thomas John Marker*, for life, without impeachment of waste, save as aforesaid; with remainder to the use of the Plaintiff *Richard Marker* (eldest son of the Plaintiff *Thomas John Marker*), for life, without impeachment of waste, save as aforesaid; with remainder to the use of the first and other sons of the Plaintiff *Richard Marker*, in tail male; with remainder to the use of the Plaintiff *John Marker* (second son of the Plaintiff *Thomas John Marker*), for life, without impeachment of waste, save as aforesaid; with divers remainders over, and with the ultimate remainder to the use of the Defendant *Henry William Marker*, in fee; and by this deed, the trusts of the term of 1000 years of the settled property were declared as follows:—"Upon trust, in the first place, by cutting, and felling, and selling, and converting into money, all or any part or parts of the timber now standing and growing on the said lands, which is, or shall be, of full and ripe growth, and not ornamental to the mansion at *Combe* aforesaid, or the pleasure grounds attached thereto, or any of the views or prospects of the same; of which timber it is hereby declared, that enough of the most ornamental shall always remain to preserve the beauty of the place unimpaired; or by demising, mortgaging, or selling the premises comprised in the said term, or any part or parts thereof (save and except the mansion-house at *Combe* aforesaid, and the several manors, messuages, farms, advowsons, rectories, lands, hereditaments, and premises, situate, lying, or being in the said several parishes of *Gittisham, Fairway, Hinton, and Buckereil*, or any or either of them, all of which are hereby expressly reserved from sale), and for all or any part of the said term, or by all or any of the said ways or means, or any other reasonable ways or means, forthwith to levy and raise the clear sum of 10,000*l.*, and to pay the same to the said

*Margaretta Marker*, her executors, administrators, or assigns, or as she or they shall order and direct, for her and their own absolute benefit. And, in the next place, from and immediately after the decease of the said *Margaretta Marker*, by all or any of the ways and means aforesaid, to levy and raise two several sums of 10,000*l.* and 10,000*l.*, and to pay the first of those two several sums of 10,000*l.* each unto the said *Thomas John Marker*, his executors, administrators, and assigns, for his and their absolute benefit; and to be by him and them received in satisfaction of any claim he may have on his brother, whether legally or otherwise, under the codicil to the last will and testament of his uncle, the Reverend *Thomas Putt*, deceased; and to pay over and apply the last of the two several sums of 10,000*l.* each to such persons and in such manner as *Margaret Frances Smith*, the wife of the Reverend *George Townsend Smith*, formerly *Margaret Frances Marker*, a daughter of the said *Margaretta Marker*, shall by any writing under her hand appoint." There is then a proviso for a cesser of the term; and there are also powers of jointuring to tenants for life, and powers of leasing, and of sale and exchange, and the usual provisions for the change and indemnity of trustees.

It appears that the tenants for life under the will of *Thomas Putt*, although their estates were impeachable of waste, on several occasions cut down timber in the three woods about the mansion house, both for use and for sale. But it is clear that there was a very large quantity of timber fit for cutting upon the estate, and particularly in these woods, when *Margaretta Marker* came into possession in August, 1844. *Margaretta Marker* did not, nor did the trustees during her life, cut down any trees upon the estate, except a few larch or fir trees, which were cut by her; and no part of the 10,000*l.* secured to her under the trusts of the term was raised or paid in her lifetime. She died in July, 1846, having by her will appointed the Defendant *Henry William Marker* to be her executor.

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Upon the death of *Margaretta Marker*, the Defendant *Henry William Marker* entered into possession of the estate as succeeding tenant for life under the resettlement; and in January, 1849, 1900*l.* or thereabouts was raised by sale of timber upon the estate, and received by him in part of the 10,000*l.* secured to *Margaret Marker* under the trusts of the term. Up to this period, no difference appears to have arisen between the parties; but, some time in the year 1850, a question arose whether upon the true construction of the deed of the 11th of October, 1844, the timber made subject to the trusts of the term was not primarily liable for the three several sums of 10,000*l.* secured thereby; and for the purpose of determining this question a bill was filed in this Court in the name of the now infant Plaintiff *Richard Marker*, by his next friend; and demurrers were put in to the bill and were allowed. This suit appears to have related exclusively to the rights of the parties to the property made subject to the trusts of the term, and not to the extent of the property comprised within the term, and is, therefore, immaterial to the question between the parties on the present motion.

The suit instituted in the name of the infant Plaintiff *Richard Marker* having been disposed of by the allowance of the demurrers, the Defendants, *Kehewich* and *Pulman*, the trustees, it appears, were advised that the decision in that suit determined only that they were not bound to resort to the timber, in the first instance, for raising the sums of 10,000*l.*, but left the question undetermined, whether they have not a right to resort to the timber or to the estate for the purpose, according to their discretion; and they accordingly made a communication to that effect to the Defendant *Henry William Marker*; and the Defendant *Henry William Marker* having, on the 10th of December, 1850, advertised the 700 oak trees, which are in question on the present motion, (with 100 ash trees, which have since been cut



down,) for sale upon the 31st of December, the trustees, on the 21st of that month, filed their bill in this Court against the Defendant *Henry William Marker*, and the Plaintiffs in the present suit, and the other parties interested under the settlement of October, 1844, praying that it might be declared, that, according to the true meaning and construction of the said settlement, the Plaintiffs, the trustees, were entitled to use and exercise a discretionary power in accordance with the trusts declared by the said settlement as to the mode in which the three several sums of 10,000*l.* should be levied and raised; and that the Plaintiffs, the trustees, had a discretionary power to raise and pay the same, or any part thereof, either by resorting to the timber of ripe and full growth, other than such as was ornamental to the said mansion of *Combe*, and the pleasure grounds attached thereto, or any of the views and prospects thereof, which then were standing or growing, or which, until the said money should be fully raised and satisfied, should be standing or growing on the said estates; and that the right of the Defendant *Henry William Marker*, or any other of the Defendants thereto, who, under the limitations of the settlement, were made tenants for life of the said estates, to cut or fell any such timber, was subordinate to the right of the Plaintiffs, the trustees, to exercise such discretionary power; and that the Defendant *Henry William Marker* might be restrained by the order and injunction of this Court from cutting or felling any such timber, or selling or disposing thereof, whilst the said monies by the settlement directed to be levied and raised were not raised; the Plaintiffs, the trustees, being ready and willing and thereby offering forthwith to take all measures and proceedings necessary or proper in accordance with the trusts and discretionary power vested in them by the said settlement for levying and raising the same monies, so far as the same then remained unsatisfied. The other parts of the prayer do not appear to me material to the present motion.

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Mr. *Gidley*, as solicitor for the trustees *Kekewich* and *Pulman*, the then Plaintiffs and now Defendants, filed the bill; and Mr. *Gidley* acted as solicitor for the present Plaintiffs as Defendants in that suit, and is their solicitor in the present suit; and the timber advertised to be sold, including the oaks now in question, was clearly treated by this bill as not being "ornamental to the mansion-house, or pleasure grounds, or any of the views or prospects of the same," it being probably considered necessary so to treat it, in consequence of the terms of the declaration of trust as to ornamental timber. Upon the filing of this bill, application was made to Lord *Cranworth* for the injunction; but his Lordship declined to grant it, the Defendant *Henry William Marker* (who it must be observed was not only tenant for life, but also entitled, as personal representative of *Margaretta Marker*, to the unpaid part of the 10,000*l.*, secured to her under the trusts of the term,) undertaking to account for the produce of the timber if, and as, the Court should direct.

The injunction having been thus refused, the 700 oaks and the 100 ash trees were sold to different purchasers on the 31st of December last, and the ash trees have been actually cut down; and in this state of circumstances the present bill has been filed by *Thomas John Marker*, *Richard Marker*, and *John Marker*, the two latter of whom are infants, as tenants for life in remainder under the settlement of October, 1844, against *Henry William Marker* the tenant for life in possession under the same settlement, *Kekewich* and *Pulman* as trustees of the term, and *George Townsend Smith* and *Margaret Frances*, his wife, as interested under the trusts of the term in the 10,000*l.* thereby secured for the benefit of *Mrs. Smith*. The bill states the settlement of October, 1844, and sets forth in detail the trusts of the term. It alleges that the settled estates are not timber estates; that they consist of a mansion-house, with exten-

sive buildings, offices, and pleasure-grounds thereto attached, suitable for the residence of the owner of the estates, and used as such; of farms and lands let to tenants; and of a comparatively small portion of wood land; and that, for many years previously to the estates being put into settlement by *Margaretta Marker*, the timber growing thereon had been carefully preserved by the owners of the estates, and allowed to remain uncut; and that there was, at the date of the settlement, and at the death of *Margaretta Marker*, and that there now is, standing and growing on the estates, a large quantity of timber of full and ripe growth, and much more than is usual on estates of a like description. It then states the sale of the timber under which the 1900*l.* was raised, and the sale of the 700 oak and 100 ash trees, on the 31st of December last. And with reference to those trees, it charges that the principal portion of the trees so sold was standing and growing in a wood near the mansion-house, and that the rest thereof were standing and growing in hedge-rows, or on the open lands on the said estate; and that some of the said trees were standing and growing within 200 yards of the mansion-house; and that all the said trees so sold were ornamental to the mansion-house and grounds, and the views and prospects of the same, and ought to have been preserved as such; and that a great part thereof afforded protection and shelter to the mansion-house and offices, and the pleasure-grounds of the same, and ought to have been preserved on that account. It further charges, that, since the sale, the Defendant *Henry William Marker* has permitted the purchasers of the ash trees to enter upon the estate, and cut and fell those trees; that he has received the price thereof from the purchasers, and applied the same to his own use, or in satisfaction of the monies directed to be levied and raised. It also charges, that if the 700 oak trees are allowed to be cut down, the mansion-house, and the offices and buildings attached thereto, will be deprived of the protection and shelter af-

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forded thereby, which ought to be preserved; and the beauty of the same, and of the pleasure-grounds thereof, and of the scenery, vistas, views, and the prospects of the same will be greatly impaired; and that irreparable damage, spoil, destruction, and injury will be occasioned and committed to and upon the estates, and grievous wrong and injury done to the Plaintiffs, as the parties in remainder entitled to the estates after the Defendant *Henry William Marker*; and it prays the injunction which is sought by the present motion. The question I have to consider is, whether the injunction ought to be granted as to all or any part of the timber; and if granted at all, whether upon any and what terms?

Upon the argument of the motion before me, several points were urged upon the part of the Defendant *Henry William Marker*, which do not involve the substantial merits of the case; and it may be convenient, in the first instance, to refer to those points.

It was contended, on the part of this Defendant, that the conduct of the parties, apart from any question of acquiescence on their part, precluded them from all title to the injunction; that, having been parties to the suit instituted by the trustees, in which the timber in question was alleged not to be ornamental, they could not be permitted, by the present bill, to assert the right to it as being ornamental. But nothing further appears by the affidavits upon this subject, than that Mr. *Gidley*, the solicitor for the trustees, the Plaintiffs in that suit, acted also as solicitor for the present Plaintiffs, as Defendants in that suit; and it would, I think, be going much too far to hold that Defendants, and particularly infant Defendants, can be in any manner bound by the allegations of the bill, upon the mere ground that they were represented in the suit by the same solicitor under whose instructions the bill was filed. It does not

even appear that the Plaintiff *Thomas John Marker* appeared upon the motion in that suit; and the fact, which is undoubtedly proved, that *Thomas John Marker* interfered to impede the sale, does not appear to me to strengthen this part of the case.

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Another objection to the motion was, that there had been acquiescence on the part of the Plaintiff *Thomas John Marker*, and that acquiescence on the part of one of several Plaintiffs precludes the interference of the Court upon interlocutory applications as much as upon decree. I think the Defendants' argument upon this subject is well founded; and that, if a case of acquiescence on the part of the Plaintiff *Thomas John Marker* was established, it would be a sufficient answer to the motion. In a case before Lord *Cottenham*, when Master of the Rolls, where a bill was filed by several Plaintiffs, some of whom were infants, against an executor, for the purpose of setting aside a release, and compelling him to account for money alleged to have been improperly withheld when the release was executed, he refused to entertain a motion for payment of money into Court, upon the ground that some of the Plaintiffs had, with full knowledge of the circumstances, acquiesced in the retainer; and I think that, upon principle, the Court ought not to interfere at all, if it be fully satisfied that no decree can be made. I have, therefore, felt bound to consider the question, whether there has been such an acquiescence on the part of the Plaintiff *Thomas John Marker*, as would have barred his claim if he had been the sole Plaintiff; and I am of opinion that there has not. Neither the catalogue of the timber to be sold, nor the handbill issued upon the sale, presuming him to have seen them, contained any further description of the timber than that it was selected from the *Gittisham* coppices; and his affidavit, in reply, distinctly states that he did not know the timber advertised was ornamental until the latter end of February

Acquiescence by one of several co-plaintiffs in the act complained of, precludes the interference of the Court upon an interlocutory application as much as upon decree; and the rule is the same although some of the co-plaintiffs are infants.

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Parties cannot  
 be said to ac-  
 quiesce in the  
 claims of  
 others, unless  
 they are fully  
 cognizant  
 of their right  
 to dispute  
 them.

last, soon after which time the bill in this suit was filed. It appears, indeed, that although not prohibited from going upon the estate, there had been unfortunate disputes, which might naturally prevent him going there. It is, I think, clearly established by the affidavits, that the timber intended to be felled was (whether purposely or not it is unnecessary for me to consider) so marked, as that, had he gone upon the estate, he could not have detected the marks without traversing the woods. It is to be borne in mind, too, in considering the question of acquiescence on the part of the Plaintiff *Thomas John Marker*, that his right depended upon what, under the circumstances of this case, was to be considered as ornamental timber—a question of some difficulty for the Court itself to determine. Parties cannot, I think, be said to acquiesce in the claims of others, unless they are fully cognizant of their right to dispute them.

Delay was also urged as an objection to the motion; but the same reasons which apply to the question of acquiescence apply also to the question of delay.

The last objection, independent of the substantial merits of the case, rested upon the ground, that the purchasers of the timber were not parties to the suit. But I think this objection rather applies to the question, what security the Defendant *Henry William Marker* is entitled to require from the Plaintiffs, if the injunction be granted, than to the question whether the injunction is to be granted or not. For although purchasers of timber may be entitled in some cases to insist upon the delivery of the specific timber contracted for, and to enforce it by suit for specific performance, I apprehend a special case is required for the purpose, and that the ordinary remedy of such purchasers is in damages. The case of *Carlisle v. The South Eastern Railway Company* (a),

(a) 1 Macn. & G. 689, 699; S. C., 2 H. & T. 366, 373.

cited by Mr. *Giffard*, does not seem to me to apply. The question in that case, as I recollect it, was upon maintaining an injunction, which had been obtained at the instance of some shareholders suing on behalf of themselves and the others, against payment of dividends by the Company; and Lord *Cottenham* dissolved the injunction as to the dividends actually declared, upon the ground, that the declaration of a dividend constituted a separate right in each shareholder, and that the Plaintiffs could not therefore, as to that dividend, sue on behalf of themselves and the others. But the case involved no further question than of the right to sue, and there can be no doubt that the Plaintiffs in this case have a common interest in the subject-matter of the suit.

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I have felt myself compelled, therefore, to consider this motion upon the substantial merits of the case; and I think it may well be considered in two points of view:—first, whether the Plaintiffs are entitled to the injunction upon the ordinary doctrine of the Court in cases of equitable waste; and secondly, whether they are so entitled under the special terms of the particular deed on which their title is founded.

With reference to the first point, I consider the doctrine of the Court applicable to cases of equitable waste to be perfectly well settled. The Court considers the excessive use of the legal power incident to an estate unimpeachable of waste to be inequitable and unjust, and therefore controls it; but it exercises that control with reference to the presumed will and intention of the party by whom the power was created, and not to any fancied notions of its own, and, therefore, as to ornamental timber confines its protection to timber planted or left standing for ornament. The question, therefore, in all such cases is a question of fact, and the main difficulty lies in the evidence necessary to establish the fact.

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With respect to the second point, it is, so far as I am aware, a somewhat new question. The evident intention of the settlement is to preserve the beauty of the place unimpaired; and the deed as evidently refers to the state of the property at the time of its execution, "of which timber it is hereby declared that enough shall always remain to preserve the beauty of the place unimpaired." May it not be considered, then, that the settlor has set up a standard of beauty defined by the existing state of the place? And although there will be, no doubt, great difficulty in executing a trust or enforcing an injunction to preserve the property according to that standard, I am not prepared to hold that the difficulty is such as it is beyond the power of the Court to grapple with. Suppose the settlor had built a house, and had directed money to be applied in furnishing it in the most tasteful manner, or, to put a case nearer to the present, in laying out gardens most ornamentally, would not the Court have executed the trust (a)? And yet the judgment of the Court would, in each of the cases, have had to be exercised on matters of taste and beauty, and without any standard to guide it. The Court, too, is not unfrequently called upon to act upon the opinions of persons of science; and why should it not then act upon the opinions, which are consulted by others under similar circumstances, of persons of taste? It is to be observed, too, that in the present case the restriction upon waste is connected with the trust. It is clear that the tenants for life are not intending to cut what may not be cut by the trustees; and if therefore the restriction upon the tenants for life fails, that upon the trustees would seem to fail also. Neither the cases which have been referred to, nor others to which I have referred, seem to me to decide this question. It is true that Lord *Eldon* in the *Marquis of Downshire v. Sandys* (b) used the expression, that "the question,

The Court may more readily act in enforcing a restriction on the exercise of the legal power in a matter of taste or ornament, where the restriction is connected with a trust, than in the common law case of equitable waste in the absence of any such trust—*Seemle*.

(a) See *Lombe v Stoughton*, 12 Sim. 315.

(b) 6 Ves. 110 c.



which is the most fit mode of clothing an estate with timber for the purpose of ornament, cannot safely be trusted to the Court;" but he uses that expression with reference, not to a particular trust or a specific restriction, but with reference to the general doctrine in ordinary cases; and his observations in the second branch of the case, when it was brought before him with reference to the provision against injuring the beauty of the mansion-house, rather indicate, I think, his opinion, that the provision would be good. The case came twice before the Court: first, upon the motion to commit for a breach of the injunction; and afterwards, on a motion which had for its object both to dissolve the injunction and discharge the order which was made on the motion for committal. That part of the deed which had reference to the preservation of the beauty of the place was only brought under the consideration of the Court on the occasion of the case secondly coming before the Court; and it arose in this way, that that part of the trusts of the deed had no reference to the prior tenant for life, Lady *Sandys*. It had reference to a future tenant for life; and upon an injunction being first granted, and a motion for a sequestration (I believe it was) made, that part of the deed had not been entered on at all. After that motion had been disposed of, the case was brought before the Court on the part of Lady *Sandys*, contending, that as the deed contained a provision that the beauty of the place should be preserved unimpaired, the original injunction which had been granted was wrong; and Lord *Eldon* entered into a consideration of that question, but he entered upon it only to the extent of considering whether that provision, which applied to a subsequent tenant for life, did or did not alter the rights of the preceding tenant for life; and he held that it did not. He makes these observations upon the provision itself:—"This at least is clear, that Lady *Sandys*, claiming an estate for life without impeachment of waste upon the deed in general, must be understood, upon the

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*Judgment.*

deed, to claim that estate with such powers as the law of the land administered in a Court of law, subject to such restraints to which that law is subject as administered in a Court of equity, gives her, as to felling timber; and neither party can allege surprise in finding their legal rights affected by those restraints. With respect to the question whether there is context enough in this deed to authorise me to say the defendant can do these acts, which, in general, a tenant for life expressly without impeachment of waste is not entitled to do, because some other persons are authorised after her death to cut timber under the particular terms specified in the power of the trustees, I do not know that it is a necessary inference that one party shall have a power to-day, because another party has a power capable of being exercised to-morrow." That I believe is the only important observation that occurs in the judgment at all indicating Lord *Eldon's* view, and he there clearly makes a distinction between the trusts created by a deed, and the common case of equitable waste.

The cases of indefinite trusts of a charitable nature, to which I was referred, do not seem to me to apply. There is no standard of benevolence, and the objects are too unlimited to create such a standard; and the same observation applies to cases which, perhaps, more nearly resemble the present, where the Court has refused to enforce by injunction a covenant not to build except so as to be an ornament rather than otherwise to the adjoining property, or to keep a garden in neat and ornamental order, as in *Mann v. Stephens* (a) and *Tulk v. Moxhay* (b). The same principle, I think, applies to the latter class of cases as to the case of benevolent dispositions. You have no standard. You cannot tell what may be rather more improvement than otherwise to adjoining property; nor can you abstractedly

(a) 15 Sim. 379.

(b) 11 Beav. 571.

tell the meaning of keeping a garden in neat and ornamental order.

These being the views which I entertain of the case, and the question now being, whether I am to permit acts to be done by which the power of the Court to deal with the subject, at the hearing of the cause, will be defeated, I think that it is my duty to some extent to interfere by injunction.

I think that no case whatever is made out as to the 200 oaks not being in the woods. There is nothing whatever to shew that any of them were planted or left standing for ornament or shelter, nor is there any evidence that any of them are in fact ornamental within the provisions of the deed, except as to the eleven oaks above the orchard and the five on the road from the vicarage; and, as to these, I think the case fails. I am of opinion, therefore, that, as to these 200 trees, the injunction ought to be refused.

With respect to the 500 oaks in the woods, however, I think the case widely different. These woods are in immediate proximity to the mansion-house. The settlor, in the deed, refers to timber ornamental to the mansion-house and pleasure-grounds, and the views and prospects of the same; and there does not appear to be any evidence of there being any timber upon the estate which could fall within that description other than the timber in these woods. The settlor, too, lived for nearly two years after the execution of the settlement, and never cut any timber in these woods, although it is clear that they were crowded with timber; and here the estate was unimpeachable of waste, except as to ornamental timber. These considerations far outweigh, in my mind, the evidence on the part of the Defendant *Henry William Marker*. I cannot place much reliance on such of the affidavits on his part as state

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 been left  
 standing for  
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simply the fact that the woods were not planted or left standing for ornament or shelter, without assigning any reason for that conclusion, or much more reliance on such of the affidavits on his part as ground the conclusion on the existence of stools or stumps, without information as to the circumstances under which those trees were cut down. Nor can I rely on the acts of the tenants for life whose estates were impeachable of waste, or on the statement that the settlor intended to cut down timber in those woods, no such act having been done by her, and the statement having been made after the execution of the deed, by which the property had become bound by the trust. I should have felt it right, therefore, to interfere as to these 500 oaks, even if the question had rested simply upon the point whether they were left standing for shelter or ornament; but, beyond this, I think it clear upon the evidence that they are in fact ornamental within the meaning of the deed, and I am perfectly satisfied upon the evidence that they cannot be cut down without impairing the beauty of the place.

I am of opinion, therefore, that the injunction must go as to the 500 oaks; and I think it will be proper to extend it to other timber in the same woods, but no further. It must be borne in mind, however, that possibly the Plaintiff's case may not ultimately be established, and I must require the Plaintiff *Thomas John Marker*, therefore, to give security, as in *Wombwell v. Bellasyse* (a); and, upon the same principle, I think the security must be extended to any loss or damage the Defendant *Henry William Marker* may incur or sustain by reason of his being prevented from completing the sale of the 500 oaks, or any of them. And if the Defendant *Henry William Marker* desires it, I will add a reference to the Master to inquire whether any and which of the 500 oak trees, or any and what other trees,

(a) 6 Ves. 110 d, n.

standing and growing in the three woods, can be cut, without impairing the beauty of the place as it stood at the time of the execution of the settlement of the 11th of October, 1844. I offer that inquiry with this view, — that the report may be brought before the Court upon petition at the hearing of the cause, and then, if the Court should be of opinion, that, under the very particular terms of this trust, the true result is, that the ornamental timber is to be protected to the extent merely of preserving enough to keep up the beauty of the place, the Court will at once be in a position to relieve the parties from the difficulty of an injunction, by declaring what trees may be cut down. It is for the Defendant to consider whether he desires to have that inquiry or not.

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*Judgment.*

It would have given me great satisfaction, if I had been able to decide the question between the parties; but in such a case, all I can do is to take care that the property is preserved. The probability, I think, is, that in the result it will turn out to be a qualified and not an absolute protection which is to be thrown around the timber—somewhat similar to those cases before Lord *Eldon*, where he considers how far the appropriation of a particular part of a wood for the purposes of a ride, would or would not be a dedication of the whole forest to the purpose of ornament (*a*). It is very possible that the last direction in the declaration of trust, “that enough of the most ornamental timber shall be retained to preserve the beauty of the place unimpaired,” may be construed as applying to certain dedicated portions, and not to the whole of the timber, and that is my reason for suggesting the inquiry.

(*a*) See 6 Ves. 110 d, n.

1851.

April 24th.

## SMALLWOOD v. RUTTER.

The Court refused to dismiss or refer to the Master for inquiry the bill of infant residuary legatees, filed by a next friend, although the estate might have been administered under a claim, or the fund protected by payment into Court under the Trustee Relief Act,—the propriety of any expenses incurred being a matter for consideration in ultimately dealing with the costs of the suit.

The Court had regard to the exercise of the discretion of the father of the infant plaintiffs in authorising the suit,—no improper motives appearing, although the father did not contribute to the maintenance of the infants, and lived apart from his wife, by whom the infants were supported.

A TESTATRIX, who died in 1849, bequeathed her residuary estate (which consisted only of personalty) to trustees named *Rutter* and *Thompson*, upon trust, as to a moiety, for her daughter *Ellen Smallwood*, for her separate use, during her life, without power of anticipation, with remainder to the children of her said daughter; and as to the other moiety, for *Ellen Graham*, another daughter, and her children, in like manner.

In January, 1851, a bill was filed in the names of the infant children of *Ellen Smallwood* by *Stevens*, their next friend, against the executors *Rutter* and *Thompson*, *Edward Smallwood*, and the said *Ellen* his wife, and the *Grahams*, alleging that *Rutter* (who was a solicitor, and was empowered by the will to retain his professional costs out of the trust fund) had retained more than he ought of such funds, and that *Thompson*, the other executor, acted under his control; charging the executors in general terms with wilful neglect and default, and praying that the estate might be administered and secured under the direction of the Court, and for a receiver.

The Defendants (except *Edward Smallwood* and *Ellen* his wife) moved that the bill might be dismissed with costs, or that it might be referred to the Master to inquire whether it was fit and proper and for the benefit of the infant Plaintiffs, that the suit should be further prosecuted; and if he should find in the affirmative, that he should inquire whether *Stevens* was a proper person to be next friend,

In the absence of any fact impeaching the solvency, conduct, or character of the next friend of the infant Plaintiffs in the cause, notwithstanding he was a stranger to the family, the Court refused to refer it to the Master to inquire whether he was a proper person to be such next friend.

and if not, should approve of some other person in his place; and that the proceedings in the meantime might be stayed.

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Statement.

The motion was supported by affidavits, by the executors, by *Ellen Smallwood* the mother of the infants, and by *Ellen Graham* and her husband, denying fully the charges of neglect and default, and asserting that *Stevens*, the next friend, was a stranger to the family, and that the bill was filed at the suggestion of the Defendant *Edward Smallwood* for his own purposes or those of his solicitor, or to gratify vindictive feelings, which, it was suggested, the latter entertained against *Rutter*, and not for the benefit of the infants; that *Smallwood's* marriage with *Ellen* his wife had been against the wishes of her family; that he had since spent or lost in business the greater part of her fortune, and had become bankrupt; that his wife had, for a considerable time, lived separate and apart from him, and maintained herself and her children by her own exertions. The opposing affidavits stated that the suit had been instituted under the authority of *Smallwood*, the father, and defendant; that he had authorised the nomination of himself as next friend; and that the only object of the suit was the benefit of the infants.

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Mr. *Rolt* and Mr. *Cole*, in support of the motion, relied, first, on the next friend being an entire stranger to the family and to the case, and the nominee of the husband, or his solicitor; secondly, that, treating the suit as brought at the instance of the husband—the circumstances in which the husband was placed, the fact that the wife lived apart from him, and maintained, by her own exertions, their children—the infant plaintiffs—the husband having for a considerable time ceased to contribute to their support, deprived his authority of any weight; thirdly, that the suit

Argument.

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*Argument.*

was not justified by any necessity for inquiry or any danger of the fund; that, even if it were proper to administer the trust in Court, an application should have been made to the trustees to pay the money into Court under the Trustee Relief Act, 10 & 11 Vict. c. 96; and if that application had failed, and a suit had been necessary, the proceedings might have been instituted by claim under clause 3, Order I. of the 22nd of April, 1850. They cited *Nalder v. Hawkins* (a), *Sale v. Sale* (b), and *Fox v. Suwerthrop* (c).

Mr. *Bethell* and Mr. *Kinglake*, contra, contended that the father, as the natural guardian of his children, might exercise his discretion on the institution of such a suit for their benefit; that the minority of the infants, and the probable duration of the trust, rendered it proper that the fund should be protected; and that the mere circumstance that suits must necessarily be attended with costs, had never been regarded by the Court on the question of the propriety of their institution in such cases: *Stevens v. Stevens* (d).

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VICE-CHANCELLOR:—

*Judgment.*  
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This motion calls upon the Court to exercise a very difficult and delicate jurisdiction. On the one hand, we all regret the great expense incident to the prosecution of suits in this Court; but on the other hand, those who are best acquainted with the forms of the Court know the value of the protection thrown around the property of infants by having it administered under the jurisdiction of the Court. The Court has to consider on the one hand the great benefit which infants derive from the protection thrown around their property, and on the other hand to take care that expense is not thrown upon infants' estates, either from malicious motives, or from a

(a) 2 My. & K. 243. (b) 1 Beav. 586. (c) Id. 583. (d) 6 Mad. 97.



motive of benefit to other parties who may be interested in prosecuting such suits. The primary question therefore, in all these cases, seems to me to be, whether the suit is or is not constituted with any sinister motive; and the Court must, I think, be extremely delicate in interfering in any case in the short mode in which it is now called upon to interfere, unless it is perfectly satisfied that some sinister motive has led to the proceeding. I think that the more strongly, because, I apprehend that in all questions with reference to suits for the administration of estates, the question of costs is in the discretion of the Court at the hearing of the cause; and if the Court thinks the suit has been improperly or imprudently instituted, it may refuse to give costs out of the estate, and thus the infants may have the benefit of the protection of the Court thrown around them without having to bear the expense of the suit. Applying the principle to the present case, let us see what are the facts. It is undoubted here that the suit was instituted by the direction of the father of the infants. The father must be considered as having the legal guardianship of the infants. That cannot be denied. Having that guardianship vested in him, he has exercised his discretion in determining that it is for the benefit of his children that the suit should be instituted, and their property secured under the direction of the Court; and this motion, in truth, calls upon the Court to exercise its own discretion against the discretion of the father.

Now, what has been the conduct of the father in this case? I pass by the observations which have been made upon the facts which shew a state of unfortunate embarrassment. He is separated from his wife, not apparently from any misconduct or imputation of misconduct, but in consequence of his pecuniary difficulties. He applies to a solicitor, by whom he is told, that the only mode in which the property can be protected is by the institution of a suit

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*Judgment.*

in this Court. It is said that this protection would have been given to the infants, either by filing a claim, or by the trustees being required to pay the fund into Court under the Trustee Relief Act. It is true, that under the particular circumstances of the case, as they are suggested in the bill, either of these processes might have afforded adequate protection; but it is in the power of the Court, at the hearing of the cause, to judge of this question. If it should think, at the hearing, that a claim instead of a bill would have been effectual for the purpose, the Court may, under the Orders (if I remember rightly) restrict the amount of costs to be allowed out of the estate to those which would have been incident to a claim (*a*). The Court may also consider whether the costs shall come out of the estate with reference to the consideration that application might have been made to the trustees to bring the fund into Court under the Trustee Relief Act.

I do not see any want of bona fides on the part of the father in the institution of this suit. One circumstance struck me, which has not been particularly commented upon, that, in the instructions for filing this bill, the father was named as next friend, but in framing the suit he was made a defendant. It is difficult, therefore, to say that he did not intend bonâ fide to act for the benefit of the infants, when he himself was to be named as next friend, subject to all the liabilities and consequences to arise out of the institution of the suit. I think, therefore, that so far as relates to general principle, there is no ground on which I can dismiss the bill, or refer it to the Master to inquire whether the suit is for the benefit of the infants.

It is said that the bill contains a variety of allegations against the trustees of breaches of trust, of wilful default, and allegations on the subject of costs incurred by the trustees,

(*a*) See General Order XXXII. 22nd April, 1850.

having regard to the particular clause introduced into the will on that subject. It is a sufficient answer to this, that all the allegations will have to be dealt with by the Court at the hearing. It will be quite in the power of the Court to dismiss the bill with costs, so far as these charges are concerned, in case they are not established.

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RUTTER.  
Judgment.

With regard to the next object of the motion, the removal of the next friend, I have considered the affidavits very carefully, and all the statements on the subject of the next friend. The circumstances under which he was named as next friend are open to some degree of suspicion; but I do not think there is any substantial case made either against his solvency, character, or conduct. I must refuse the motion, but, under the circumstances, without costs.

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JOHNS v. MASON.

April 28th &  
30th.

A SPECIAL claim for the sum of 180*L*., the Plaintiff offering, upon payment thereof, to indemnify the Defendant as the Court should direct, against the liability to pay a cheque on his bankers for that sum, which the Defendant had signed.

The non-payment and probable loss of a cheque on his bankers, which A. had signed and delivered to B., is not a consideration to support a promise by A. to give a new cheque for the same amount to C., to whom it was alleged that B. had sent the lost cheque.

The claim alleged that the cheque was given in payment for wool purchased by the Defendant in January, 1848, from *Sherwood*, the Plaintiff's agent; that the wool was delivered to the Defendant; that the cheque had been sent by such agent to *Holt*, another agent of the Plaintiff, by post, and had not reached the Plaintiff or *Holt*, or been presented at the bank. The claim averred, that the Defend-

The Plaintiff in a claim, as in other

forms of proceeding, can only recover *secundum allegata et probata*.

The Court will not, under the 13th Order of April, 1850, upon the hearing of a claim, direct further inquiries to be made, or other proceedings to be had, for the purpose of ascertaining the Plaintiff's title to the relief claimed, where such inquiry would, in effect, be recommencing the case, or originating another case.

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*Statement.*

ant had never paid for the wool except by the delivery of the cheque; that he was still indebted to the Plaintiff in the said sum of 180*L*.; and that in consequence of his having given the cheque, he could not be sued in a Court of law for the said sum.

The Plaintiff proved by the affidavit of *Holt*, that he had not received the cheque, and, in reply to an application for another, *Holt* received from the Defendant the following letter, dated the 9th of February, 1848:—

“*Cliff Mill*, February 9th, 1848.

“Sir,—I am sorry you have not received the cheque of January 29th, for 180*L*., which I gave Mr. *Sherwood* on that day to remit you, and am sure was sent you by that night's post. There is a possibility of the cheque turning up yet, and Messrs. *Johns* had better wait, say three weeks or so; and if the cheque does not come to hand in that time, if Messrs. *Johns* will indemnify me if I give them a cheque for the amount, as I shall require this, because I must not have the risk of the first cheque being presented, I shall have no objection to do so. You had better let the thing rest until that time, during which time every inquiry shall be made to recover the missing cheque, as I am sure Mr. *Sherwood* sent the cheque, as I have before stated, and your coming over in this way is only adding expenses which had better be avoided for his sake. If you receive the letter with cheque, send me a few lines to that effect.

“I remain, &c.,

“H. MASON.”

The affidavit of the Defendant denied any knowledge on his part, at the time of the purchase of the wool from *Sherwood*, that the latter was the Plaintiff's agent, and asserted that *Sherwood* had represented himself to be acting on his own account; that the Defendant had settled his account with *Sherwood*, including the purchase of the wool, and paid him

the balance in November, 1847; that afterwards, in December, 1847, or January, 1848, the Defendant was for the first time told by *Sherwood* that part of the wool purchased of him belonged to the Plaintiff; and that on the 29th January, 1848, *Sherwood* told him that he owed the Plaintiff 180*l.*; and the Defendant, at the request of *Sherwood*, and as a loan to him, drew, and delivered to *Sherwood*, a cheque on the *Yorkshire Banking Company*, payable to *Sherwood* or bearer, for 180*l.*, *Sherwood* giving the Defendant security for the amount by an assignment of the proceeds of the sale of some real estate, alleged by *Sherwood* to belong to him; that *Sherwood* afterwards told him he had forwarded the cheque by post to the Plaintiff; that in the course of his correspondence with the Plaintiff on the subject of the cheque, the Defendant discovered that the security given to him by *Sherwood* could not be relied on, and that he therefore determined not to give a new cheque for *Sherwood's* benefit. The Defendant, by his affidavit, denied that he was ever indebted to the Plaintiff, and said, that he was advised that he was still liable upon the cheque, and submitted that the remedy of the Plaintiff, if any, was at law.

The case of the Defendant rested upon his own affidavit, and upon an account dated the 4th October, 1847, signed by *Sherwood*, in which the sums of 117*l.*, 63*l.* 15*s.*, and 26*l.* 17*s.* 4*d.* on one side, were without other explanation set off against sums on the other side, shewing a balance of 6*l.* 16*s.* The Defendant proved also two letters that he had written to the Plaintiff in March, 1848, in which the loss of the cheque was referred to as a circumstance that *Sherwood* alone was answerable for.

The Plaintiff did not produce, or account for the absence of, any affidavit from *Sherwood*; and the Defendant tendered no evidence as to the security upon which by his

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affidavit he alleged that the loan of 180*l.* was to have been made to *Sherwood*. By affidavits in reply, the Plaintiff said, that the sum of 117*l.* and 63*l.* 15*s.* in the account produced, as well as the date, would correspond with and was probably the price of the wool; that he believed the other side of the account was made up by inserting some old debt or demand of the Defendant against *Sherwood*; and that the case as between the Defendant and *Sherwood* had never been suggested by the Defendant until after the claim was filed.

*Argument.*

Mr. *Rolt* and Mr. *Bigg* for the Plaintiff.—The Plaintiff was entitled in equity to recover payment of the amount of the cheque upon giving an indemnity: *Macartney v. Graham* (a). The delivery of the cheque to the Plaintiff's agent was equivalent to a delivery to the Plaintiff. The cheque when posted was at the risk of the creditor, and upon its loss the debtor was discharged at law: *Warwicke v. Noakes* (b), *Hansard v. Robinson* (c), *Hawkins v. Rutt* (d), *Walter v. Haynes* (e). Whether, therefore, the cheque was given to *Sherwood* as the agent and for the wool of the Plaintiff (as they submitted that the evidence established), or was given to him as a principal, the Plaintiff by the act of the Defendant and *Sherwood*, or of *Sherwood* alone, had become the owner of the cheque, and having no remedy at law for the debt in respect of which the cheque was given (2 Chitty on Contracts, 767), he was therefore entitled to sue upon the cheque as against the maker. The letter of the 9th of February, 1848, was moreover a valid promise founded on an antecedent debt or duty.

(a) 2 Sim. 285.

(b) 1 Peake N. P. C. 98.

(c) 7 B. &amp; C. 90.

(d) 1 Peake N. P. C. 248.

(e) Ry. &amp; Mo. 149.

The *Solicitor-General* and Mr. *Elmsley*, for the Defendant, contended, that there was no proof of the alleged agency, of any privity between the Plaintiff and Defendant, of the delivery of the cheque so as to vest the ownership in the Plaintiff, or of any consideration for the new promise alleged to be contained in the letter of February, 1848: *Davis v. Dodd* (a). There was, moreover, no authority for the proposition upon which the suit was founded, that, after a cheque had been given, the party to whom it was delivered could not sue for the debt in respect of which the cheque had been given. There was, with respect to the cheque, an absence of the contract which, in the case of bills or notes, precluded the payee from suing for his original demand. The cheque was not *prima facie* payment. If the Plaintiff had any right, and had not been satisfied, there was nothing to prevent him from suing at law: *Bevan v. Hill* (b).

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VICE-CHANCELLOR, (after stating the claim, and the substance of the affidavits):—

April 30th.  
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In this state of the evidence, the case has come before me for hearing; and I have been asked to make a decree for payment of the 180*l.* upon three several grounds:—first, that the Plaintiffs have established that the cheque had been given for the purchase-money of their wool, purchased by the Defendant from *Sherwood*, and have proved that the cheque has been lost; secondly, that, whether the cheque was given for the purchase-money of the wool or not, the cheque had become the Plaintiffs' property; and thirdly, that there was a binding promise by the Defendant to give another cheque for the same amount. But I am of opinion, as to the first point, that the Plaintiffs

(a) 4 Taunt. 602.  
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(b) 2 Camp. N. P. 381.  
D

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have not given sufficient evidence to prove the case; as to the second point, that the claim is deficient in allegations necessary to establish the Plaintiffs' title to relief in equity; and, as to the third point, that there was no consideration sufficient to support the promise.

The claim having been filed by leave of the Court, I feel some reluctance in dismissing it; and I have, therefore, considered whether the case could properly be put in train for further inquiry: but, in the imperfect state of the evidence, I do not see my way to direct further proceedings, with justice to the parties, without in effect recommencing the case, and recommencing it in a manner which may lead the parties into expense and litigation far beyond what may be necessary, if the regular course of proceeding by suit be adopted.

The Orders for proceeding by claim were not, in my opinion, intended to apply to a case like the present; and I am satisfied that leave to file this claim would not have been given, or, as I believe, asked for, if the case which has been set up had been anticipated. I am of opinion, therefore, that the claim must be dismissed; and I think that the Plaintiffs have no right to complain of the dismissal, as it is clear that they have not brought forward the whole case on their part, and have kept back evidence which it was in their power to give. The Plaintiffs have not, I think, under such circumstances, any right to complain that the Court refuses them the benefit of the summary course of proceeding under these Orders.

Having arrived at the determination to dismiss the claim, I purposely abstain from pointing out what in my opinion are the particular defects in the evidence and in the allegations; for I think that great mischief will ensue, if the defects in cases heard upon claims be pointed out,



when the parties may be permitted to institute further proceedings. It will very likely lead to improper attempts to supply the defects in the future proceedings.

In the course of the argument some observations were made upon the inconvenience of holding parties to strict rules of pleading in proceedings by claim; and I think it right, therefore, to observe, that the Orders were not, as I conceive, intended at all to alter the ordinary rule of the Court to proceed *secundum allegata et probata*.

I have felt some doubt about the costs: but, having regard to the fact that the Defendant also, as I think, has withheld from the Court material information, I shall give no costs. My order, therefore, will be, to dismiss the claim without costs, and without prejudice to any other proceedings which the Plaintiffs may be advised to adopt.

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MASON.  
Judgment.

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SCOTT v. LORD HASTINGS.

May 2nd.

**A** CLAIM for the execution of the trusts of a deed created for the payment of various debts and charges out of the produce of real and personal estate vested in the trustees, was filed in January, 1851, by the assignee of a puisne incumbrancer, who was one of the *cestui que trusts* of the deed. In March, 1851, another party interested under the deed filed a bill for the execution of the same trusts, charging also that breaches of trust had been committed by one of the Defendants, and seeking relief in respect of the same.

The Court, upon the hearing of a claim, made an order for taking accounts and executing a trust; and *held*, that the pendency of a suit by bill, in which the same accounts and directions would be necessary, and which sought additional relief in respect of alleged breaches of trust, was not a ground for staying the order upon the claim.

The claim now came on to be heard; and it was submitted, that the pendency of the other suit was no objection to a decree on the claim, as such a decree would be no obstacle to any additional relief which the Plaintiff in the

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other suit might be entitled to: *Shepherd v. Towgood* (a). On the part of several of the Defendants it was objected, that, inasmuch as a bill was pending, the object of which not only included all the relief which was sought by the claim, but also other relief not within the scope of the claim, the Court would defer making an order upon the claim until the hearing of that suit.

Argument.

Mr. Calvert and Mr. Piggott appeared for the Plaintiff; and *The Solicitor-General*, Mr. Bacon, Mr. Rolt, Mr. Baily, Mr. Amphlett, Mr. Goldsmid, and Mr. Cole, for the different Defendants.

VICE-CHANCELLOR:—

Judgment.

I have long anticipated that objections of this kind would arise in suits prosecuted by claim. If, however, I were to stay the decree on this claim, it would follow, upon the same principle, that I must stay every decree upon a claim, where a bill has been filed for the execution of the same trust. I will not say that there may not be cases of two suits, one by claim and another by bill, in which it may appear to the Court that a more perfect decree would be made on the bill; but in this case the same accounts must be taken, whether the decree be made in one suit or the other. It is possible, that a case may be stated on the bill, and made out in evidence, which will entitle the Plaintiff in that suit to something further than is required in the order to be made upon the claim; but I cannot, I think, stay the decree in this case, on the ground that another decree, embracing some additional inquiry or relief, may hereafter be made. The proceed-

(a) T. & R. 379.

ings under the bill may be suspended or dismissed; or, if not, a year or two may elapse before the answers are got in, the evidence is taken, and the cause comes on to be heard; and in the meantime I shall have done the Plaintiff the injustice of delaying his suit, and preventing him from having the benefit of the decree.

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ILLINGWORTH v. COOKE.

May 5th & 6th.

**C**ATHERINE FERRELL, a widow lady residing in Honduras, after bequeathing 500*l.* sterling and some specific articles to her daughter, proceeded:—

“To all my grandchildren, with the exception of one, viz. ———, I will and bequeath the remainder of the proceeds of my property, after paying the afore-mentioned 500*l.*, share and share alike, to them and their heirs for ever.”

A gift to all the grandchildren of the testatrix, “with the exception of one, viz. ———” established as a gift to the class, not affected by the incomplete exception.

*Marshall Bennett*, the executor of the testatrix, remitted the proceeds of her residuary estate to *England*, and the shares of five grandchildren were paid over to them, the share of the Plaintiff, who was an infant, being retained. *Bennett* died, and his executors were advised that the exception made or intended in the above bequest rendered the gift doubtful.

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Mr. *Rolt* and Mr. *Selwyn*, for the Plaintiff, contended, first, that it was not competent to the executors of *Bennett* to take the objection after the payments which had been made by their testator; and secondly, that there was an effectual gift to all the grandchildren. The utmost inference which arose from the words of exception was, that

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 —  
*Argument.*

the testatrix had at one time entertained a design, which she had never carried into effect, of excepting one of her grandchildren. The gift was plain and distinct, and included all the grandchildren living at the death of the testatrix. The uncertainty was created only by the exception, and would not render the gift void. The exception only would be void: *Goblet v. Beechey* (a), *Campbell v. Brownrigg* (b), *Arthur v. Hughes* (c). The case might be likened to those in which it had been held, that a distinct gift would not be defeated by a doubtful or imperfect revocation. The intention to revoke must be as clear as the devise: *Doe d. Hearle v. Hicks* (d).

The VICE-CHANCELLOR held, that the Defendants were not precluded from taking the objection, and submitting the title of the Plaintiff to the judgment of the Court.

Mr. Piggott, for the executors of *Bennett*, cited *Hunt v. Hort* (e) and *Strode v. Russel* (f). In the latter case it was ruled, that, "if a devise be to one of the sons of *J. S.*, who hath several sons, the devise is void;" but such a devise was not more uncertain than a devise to all the sons of *J. S.*, except one.

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VICE-CHANCELLOR:—

*Judgment.*  
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I think, upon the whole construction of the will, that the Plaintiff is entitled to this fund. I am better satisfied with the analogy which has been suggested between this case and the cases of uncertainty, than with the argument which has been founded on the cases of imperfect revocation. I think that I must consider the testatrix as

(a) 2 R. & M. 624.

(b) 1 Phill. 301.

(c) 4 Beav. 506.

(d) 8 Bing. 475.

(e) 3 Bro. C. C. 311.

(f) 2 Vern. 621, 624.

not having made up her mind whether she would except any of her grandchildren, or which of them she would except, from the benefit of her residuary bequest; and in the absence of any expression of her determination to except any particular grandchild, the gift will take effect in favour of the grandchildren as a class. In the case of a devise by a testator of his real estate, except ——— close, it could not be said that the whole devise was void for the want of a specification of the close intended to be excepted. If it would not make the devise void, when the blank occurs in the description of the excepted part of the estate, I think it will not do so in the case of the blank occurring in respect of the person; and that the gift to the class in this case is not defeated by the words which follow.

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Judgment.

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PENNY v. PENNY.

May 8th.

**T**HE testator, a farmer, by his will, dated in 1817, after directing his debts, &c., to be paid, and giving legacies of 100*l.*, 200*l.*, and 200*l.* to three of his children at twenty-one, with interest thereon in the mean time, directed that, with the remainder of his estate, his executors should continue his wife, and such of his children as should be living with him at the time of his decease, upon the farm then occupied by him, for the equal benefit of each of them, so long as they should keep single; but if any of

deceased executor, where such personal representatives would have been necessary parties to a suit before those Orders were made.

It is in the discretion of the Court, at the hearing of a claim, to grant or refuse the relief thereby sought, notwithstanding the case may fall within one of the classes referred to in the General Order I. of the 22nd of April, 1850.

Where, by the decree upon the claim of a legatee, it would be necessary to take the accounts of a trade carried on by persons who were not parties to the claim,—of the assets by which it was alleged that the trade had been carried on,—and of the allowances which should be made in remuneration of the persons employed in it who were not parties to the claim, and the claim contained no statement of the facts upon which such accounts and inquiries might depend,—the Court refused to direct inquiries into the facts necessary to be shewn in order to sustain the claim, but dismissed the claim without costs and without prejudice to a bill.

The General Orders of the 22nd of April, 1850, do not enable a Plaintiff in a claim, suing for a legacy or for administration, to proceed against a surviving executor in the absence of the personal representatives of a

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the said children should marry, then he, she, or they so married should depart, leaving his, her, or their mother, with the other children, in peaceable possession of the said personal estate; and he directed, that, when his youngest daughter should have attained twenty-one, they his said trustees should cause all his personal estate to be valued, and out of the said property should place the sum of 400*l.* on such security as they or their counsel should advise, for the use of the testator's wife for her life, and at her decease should divide the said sum of 400*l.* among the testator's children, *Sarah, John, Ann, Joseph, Jane, George, and William*, or their lawful issues, with benefit of survivorship if any of the said children should die leaving no lawful issue. And the testator directed his trustees to divide all the remainder of his personal estate amongst his children.

The claim was filed by one of the legatees of the 400*l.* The claim stated the bequest of the 400*l.*, the death of the testator in 1817, and of his widow in 1845; that the youngest daughter attained twenty-one in 1832; that the Defendant *Penny* had survived his co-executors, and was the sole existing executor; and that the Plaintiff was entitled to one-seventh of the 400*l.*, with interest from the death of the widow; of which the Plaintiff claimed payment, or in default to have the personal estate of the testator administered by the Court on behalf of the Plaintiff and all the other legatees.

The Defendant by his affidavit stated, that the personal property of the testator amounted to 1562*l.* 4*s.* 10*d.*; and that, after payment of 224*l.* 6*s.* 8*d.* thereof for debts and funeral and testamentary expenses, 1337*l.* 18*s.* 2*d.* remained, and constituted the only fund out of which certain promissory notes for sums amounting together to 770*l.*, owing by the testator at his death, and the three prior le-

gacies of 100*l*., 200*l*., and 200*l*., could be paid; and that if those sums had been paid, a balance of 67*l*. 18*s*. 2*d*. only would have remained to carry on the farm. That the widow of the testator, and his unmarried children who were living with him at his decease, and such of them as remained single, had ever since continued to reside upon the farm. That a promissory note of the testator for 200*l*., and one of the legacies of 200*l*., were still unpaid; and that, from the death of the testator until his youngest child attained twenty-one, the farm business was properly and economically carried on by means of such part of the personal estate as had not been applied in payment of the debts and legacies, and by the personal labour of such of the said children as resided there, without wages or emolument further than their maintenance and clothing; and that the widow of the testator had been thereby supported. That when the youngest child attained twenty-one, the personal estate, including the farming stock, had been valued at 527*l*. 18*s*. 6*d*. That, in addition to the 200*l*. debt and 200*l*. legacy unpaid, there was a sum of 210*l*. owing for rent; and that there was no personal estate (other than what had been valued as aforesaid) to meet such outstanding liabilities, or the legacy of 400*l*., the seventh part of which was the subject of the claim.

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Mr. *Rolt* and Mr. *Westoby* for the Plaintiff.

*Argument.*  
 —

Mr. *J. Baily* for the Defendant, the executor, objected, first, that the representatives of the deceased executor were necessary parties to the claim, as it involved the administration of the estate. The 32nd Order of August, 1841, did not apply to administration suits: *Kellaway v. Johnson* (a), *Perry v. Knott* (b), *Biggs v. Penn* (c), *Shipton v.*

(a) 5 Beav. 319

(b) *Id.* 293.

(c) 4 Hare, 469.

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*Rawlins*(a). In the administration of the estate it would be necessary to take an account of the receipts and disbursements in respect of the farm, having regard to the directions of the will; and such a case could not be conveniently prosecuted by claim. The Plaintiff should be left to file a bill, distinctly raising the issues between the parties.

Mr. *Rolt* in reply.—The small amount which was sought to be recovered, had indicated the proceeding by claim as the most suitable. It was, moreover, within the express terms of the General Orders of April, 1850, which enabled a legatee in that form to sue for “payment or delivery of his legacy out of the deceased’s personal assets (b),” and the mere allegation of the defendant, that there was some answer to the claim, which might require special inquiries or accounts, was not enough to take the case out of the scope of the General Orders. As to parties—under the 8th of the same Orders, the person to be named in the writ of summons “in the first instance,” was only the person against whom the relief was directly claimed. If assets were in the hands of the representatives of deceased executors, the defendant, as surviving executor, had power to recover them, and would be directed to do so in this suit; but he had no interest in requiring the representatives of the other executors to be parties, as he would be answerable only for his own receipts and defaults. If, however, it should appear, on taking the accounts, that other parties ought to be before the Court, the difficulty was removed by the 18th Order of April, 1850, which enabled the Master to certify the necessity of the presence of such other persons; whereupon they might be made parties by a new writ of summons.

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(a) 4 Hare, 619. (b) Gen. Order I, 22nd April, 1850, Clause 2.



VICE-CHANCELLOR:—

In giving my opinion upon this case, I do not intend to lay down any general rule as to the cases which may be considered as falling within the jurisdiction by claim, under the Orders of April, 1850. It would be inconvenient to do so, as it would tend to fetter the discretion which it was the intention in framing those Orders to reserve to the Court. The intention of reserving such a discretion to the Court is manifest from the language of the 13th of those Orders. It was evidently intended by that Order, to reserve to the Court a discretion at the hearing of the claim, either to grant or refuse relief or direct inquiries, according as the Court might or might not think, upon the facts before it, that justice could ultimately be done between the parties.

It has been argued, that the Orders of April, 1850, enable the plaintiffs to proceed at once against a surviving executor, in the absence of the personal representatives of a deceased executor. I do not think that was the intention of the Orders. If such had been the intention, I think it would have been more pointedly referred to in the Orders, having regard to the decisions which at that time had been pronounced upon the construction of the 32nd Order of August, 1841. The question had been frequently under the consideration of the Court, whether, under the 32nd Order of August, 1841, an administration suit could be maintained against one of several executors in the absence of the others, or of the personal representatives of those who were dead, and, in several cases, it had been determined by the Court, that the 32nd Order did not apply to such a suit. If the Orders of April, 1850, had been intended to alter that state of the law, there would, I think, have been some express provision inserted for the purpose. It appears, therefore, quite open to the Defendant to object at the hearing, that the personal representative of the de-

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*Judgment.*

ceased executor is a necessary party to the proceedings on the claim. The question then is, whether the objection is well founded; and I am of opinion that it is, and that it must be upheld.

The next question is as to the proper mode of dealing with the claim, whether leave should be given to amend, so as to introduce the representatives of the deceased executor, or whether the case is one in which the proper form of proceeding is by bill. I am of opinion, that the mere introduction of the representatives of the deceased executor as parties to the claim, would not perfect the claim or assist the present case. The testator has directed certain legacies to be paid out of the estate, and that the residue shall be employed in carrying on the farm, until his youngest child shall attain her majority. The whole property is then to be valued, and after the appropriation of 400*l.* thereout, upon the trusts under which the claimant's demand arises, the residue is to be divided amongst the testator's children. In directing the accounts, therefore, the common account of the personal estate of the testator will not suffice to meet the case. It will be necessary to include in the decree, in some terms, and against some parties, an account of the personal estate employed in carrying on the farm, according to the directions of the testator. Great difficulty will arise in carrying out such a decree. The Court must consider with whose assets the trade has been carried on. The case represented by the Defendant is, that, at the death of the testator, the excess of the assets over the aggregate amount of the debts and the legacies given by the will, in priority to the 400*l.*, amounted to 67*l.* 18*s.* 2*d.*, and that that sum was all that would have remained to carry on the farm, had such debts and prior legacies been paid. If that be the true state of the case, the trade must have been carried on with the assets of those parties who were entitled to the personal estate in priority to the de-

mand upon the present claim. One question would be, what account ought to be directed, having regard to that fact? The Defendant also states, that, whilst the business of the farm was carried on, several of the children of the testator were employed in and supported out of the produce arising from the management of the farm. Another question would therefore be, what allowances should be made in respect of such employment, and to whom they should be made. It is evident, that inquiries would have to be directed in respect of the carrying on of the farm, independently of the other question, whether the accounts are to be directed as against the executors, or as against the parties in whose hands the testator directed the personal estate to be left, for the purpose of carrying on the trade. As a foundation for any special directions as to the trade, the Court must have a clear statement of the facts connected with the carrying it on. *Mr. Rolt* suggested, that the suit might be worked out by means of inquiries under the decree. I have, in a late case before me, felt the difficulty of directing inquiries without any statement of specific facts upon which to ground them. No such specific facts appear upon this claim. The claim does not refer to any of the circumstances under which the farm was carried on, nor even call for an account in respect of the management of the farm. In these circumstances, I think the case is one in which the proceeding should be by bill rather than by claim; and that the proper order to make will be, to dismiss the claim without prejudice to a bill being filed. The Orders of April, 1850, were not intended to apply to such a case.

As to the observations of *Mr. Rolt*, upon the language of the 8th Order of April, 1850, that "in other cases," (other than those mentioned in the preceding Order), the only person who need be named in the writ of summons as defendant in the suit in the first instance, is "the person

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*Judgment.*

against whom the relief is directly claimed." Without intending to give a conclusive opinion as to the meaning of the words "in the first instance," I am inclined to think that the object is, to enable the claimant to proceed against one party in the first instance; and then, if the Court requires the presence of others, it might give the necessary directions at the hearing of the claim. It may mean, that one party can be served in the first instance, upon the chance of his giving the relief which is asked. For example, in the simple case of a claim for a legacy against one out of several executors, or against a surviving executor, the executor on being served may admit assets, and, in that case, a decree might at once be made. If, however, the Defendant were to say, "I do not admit assets for payment of the legacy," the Court may, at the hearing, require the presence of the other executors, or of the representatives of the deceased executor.

Upon the question of costs, I have felt some doubt. It appears, however, that considerable difficulty has arisen from the terms in which the Orders of April, 1850, are framed, as to the cases which fall within them. The Orders appear in some degree to have misled parties into the belief, that cases might be brought within them, to which it was never intended that they should apply. I think, therefore, that, in this case, justice will be better done by dismissing the claim without costs, than by directing them to be paid by the Plaintiff.

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## SQUIRE v. FORD.

April 29th,  
May 1st.

THE Plaintiff, *Squire*, obtained a judgment of Trinity Term, 1848, against *W. A. H. Arundell*, for 605*l.* 6*s.* 8*d.* and 9*l.* 13*s.* 6*d.* for damages and costs, which was duly registered on the 19th of August, 1848. The Defendant, *Ford*, also obtained a judgment against *W. A. H. Arundell*, for 3000*l.* as a security for 1495*l.* 18*s.* 8*d.* and interest; and this judgment was registered on the 1st of November, 1848.

By a deed, dated the 27th of December, 1848, made between *W. A. H. Arundell*, of the first part; *H. Cotterill* and two others, as trustees, of the second part; and the several persons who were creditors, and who, by themselves or their copartners or agents, executed the deed, of the third part: reciting that *W. A. H. Arundell* was seised of a certain mansion-house and lands, subject to certain mortgages to *Cotterill* and other persons, and also subject to the costs due and to become due to *Cotterill*, and the charges due to *Hoggart & Co.* in respect of an attempted sale of the premises; and reciting that *W. A. H. Arundell* was entitled to certain furniture and fixtures, plate, and other personal estate; and that, being indebted to various persons, he had proposed and agreed to execute an assignment of the said real and personal estate and effects to the

By a deed conveying the real and personal estate of a debtor to trustees for the benefit of his creditors, the creditors executing the deed covenanted that it should operate and enure, and might be pleaded in bar, as a good and effectual release and discharge of all and all manner of actions, suits, bills, bonds, writings, obligations, debts, duties, judgments, extents, executions, claims, and demands, both at law and in equity, which they or any of them had or might have against the debtor or his estate or effects, for or by

reason of all or any of the debts or engagements to them respectively due or owing by him; such covenant not to destroy any mortgage, pledge, lien, or other specific security which any creditor possessed:—*Held*, upon the construction of the entire deed, that such general words had not the effect of releasing a judgment previously obtained by one of the creditors who executed the deed, so as to affect the priority of the creditor as between himself and a judgment creditor who was not a party to the deed, or so as to preclude the judgment creditor who executed the deed from enforcing the right which the judgment gave him as against the estate vested in the trustees.

A judgment creditor who had executed a deed, whereby the real and personal estate of the debtor were conveyed to trustees for the benefit of such of his creditors as should execute the deed, assigned his judgment to such trustees:—*Held*, that the trustees could not be considered as owners of the trust estate, so that the assignment by the judgment creditor would have the effect of merging the judgment.

That the judgment creditor having assigned his judgment to the trustees of a creditors' deed, in trust for the benefit of the creditors who had executed the deed (of whom he was himself one), was entitled to sue on behalf of himself and all such other creditors, for the establishment of their rights in respect of the trust estate and the execution of the trusts.

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three trustees (the parties of the second part), in trust, for the benefit of his creditors; "to which the creditors, parties thereto of the third part, had agreed, and to accept the same in full discharge of their respective debts, and to enter into such covenants in that behalf as are therein-after contained:" And the said *W. A. H. Arundell* thereby conveyed and assigned the said real and personal estates to the said three trustees, upon trust for sale, and to stand possessed of the monies to arise from such sale, upon trust, to pay the costs of the indenture and of executing the trusts; and, in the next place, to pay and satisfy, rateably and proportionably, and without any preference or priority, to the creditors, parties thereto of the third part, the several debts or sums set opposite their respective names therein, and to pay the surplus proceeds, if any, to *W. A. H. Arundell*, his executors, administrators, and assigns: And it was thereby witnessed, that, in consideration of the premises, the parties thereto of the third part covenanted with *W. A. H. Arundell*, that, immediately after the indenture should be discharged from the provision therein-after contained for making void the same, the covenant now in statement should operate and enure, and might be pleaded in bar, as a good and effectual release and discharge of all and all manner of actions, suits, bills, bonds, writings, obligations, debts, dues, duties, accounts, sum or sums of money, judgments, extents, executions, trespasses, trusts, claims, and demands, both at law and in equity, or otherwise howsoever, which they or any of them, or their or any of their heirs, executors, or administrators, then had, or thereafter might have, claim, challenge, or demand against the said *W. A. H. Arundell*, his heirs, executors, or administrators, or his or their estate or effects, or any of them, for or by reason or on account of all and every or any of the debts and engagements to them or any of them respectively then due and owing from or by the said *W. A. H. Arundell*, or of any interest, exchanges, or commission, due or de-

mandable for the same, or any other matter, cause, or thing whatsoever, in respect of the same debts or engagements; but so, nevertheless, that the covenant now in statement should not operate upon or destroy any mortgage, pledge, lien, or any other specific security which any creditor then possessed in respect of his debt. And further, that if in the meantime, and before the indenture should be discharged from the said proviso, the said creditors or any of them, or their or any of their respective partner or partners, should commence or prosecute any action or actions, suit or suits, at law or in equity, or take any proceedings against the said *W. A. H. Arundell*, his heirs, executors, or administrators (except for conformity or for making available any such mortgage, charge, lien, or specific security, as aforesaid), for or on account of the whole or any part or parts of the debt or debts then due and owing by the said *W. A. H. Arundell* to them or any of them, then and in every such case, and immediately, the debts or debt for or in respect of which such action or actions, suit or suits, or proceedings should have been so commenced or prosecuted, should become absolutely forfeited, and this covenant should operate and enure, and might be pleaded in law, as a good and effectual release and discharge of such debt or debts respectively. Provided always, and it was thereby agreed and declared between and by the parties thereto, that nothing therein contained should extend or be deemed to extend to prevent the said several creditors, parties thereto, or any of them, their or any of their respective heirs, executors, administrators, or assigns, from enforcing or otherwise obtaining the full benefit of any charge or lien which they or any of them then had upon any estate or effects whatsoever, or from suing or prosecuting any person or persons other than the said *W. A. H. Arundell*, his heirs, executors, or administrators, who was or were, or should or might be liable or accountable for the payment or making good to any of the

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said creditors of all or any part of their said respective debts, either as drawers, indorsers, or acceptors of any bill or bills of exchange or promissory note or notes, or as being jointly or severally bound in any bond or bonds, obligation or obligations, or other instrument or instruments, or as being liable or accountable for the payment of any such debt or debts, without having subscribed any bill, note, bond, or other instrument whatsoever, or otherwise howsoever, as if the indenture now in statement had never been made.

The indenture then provided, that if all the creditors of *W. A. H. Arundell*, whose debts respectively amounted to 3000*l.* and upwards (not sufficiently secured), should not execute the indenture on or before the term therein mentioned, the indenture and everything therein contained (but subject and without prejudice to any sale, disposition, or other act made or done under the same,) should cease, determine, and be utterly void, to all intents and purposes whatsoever.

The Plaintiff was one of the creditors who executed the foregoing deed.

An indenture, dated the 13th of June, 1849, was made by the Plaintiff *Squire* of the one part, and the three trustees of the deed of the 27th of December, 1848, of the other part, reciting that deed, and that thereby all the real and personal estate and effects of *W. A. H. Arundell* were assigned and transferred to the said trustees, in trust for the benefit of such of the creditors of *W. A. H. Arundell* as should execute the same deed; that a first dividend of 4*s.* in the pound was payable under such deed; that the said judgment obtained by *Squire* was wholly unsatisfied; and that *Squire* had consented and agreed to transfer to the said parties of the second part, as such trustees for the creditors of *W. A. H. Arundell*, the said



judgment debt, and all monies secured and payable thereby, in consideration of the several dividends payable and to be paid under the said recited deed; and the Plaintiff *Squire* thereby, in pursuance of the said agreement, and in consideration of the premises, assigned and transferred unto the said three trustees the recited judgment debt and costs, and the full and whole force, benefit, and effect thereof, and all the right, title, and interest of the Plaintiff in or to the same, To have and receive the said judgment debt and costs, sum and sums of money, or other the premises, to the said parties of the second part, and the survivors or survivor, &c., absolutely, as such trustees or trustee as aforesaid.

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The bill was filed by *Squire* on behalf of himself and all other the creditors of *W. A. H. Arundell*, who by themselves, their copartners and agents, had executed the deed of the 27th of December, 1848 (alleged to be upwards of sixty-five in number), except such of them as were Defendants,—against *Ford*, who had not executed the deed, *W. A. H. Arundell*, the trustees appointed by the deed, and certain of the creditors who had executed it. The bill prayed a declaration, that the said judgment obtained by the Plaintiff constituted a subsisting lien and charge upon all the said real estates and all other the real estate of *W. A. H. Arundell*, and a lien and charge in priority to the judgment of the Defendant *Ford* and to his claim in respect thereof, and in priority also to the several liens or charges of the other Defendants; that the real estate might be sold; and that, out of the monies to arise from such sale, the amount due for principal, interest, and costs, in respect of the Plaintiff's judgment, might be paid to the Defendants *Cotterill* and the two other trustees, as such trustees as aforesaid, or otherwise to the Plaintiff for the benefit of the Plaintiff and all other persons beneficially interested therein, according to their respective rights;

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and that the residue of the monies to arise from such sale might be dealt with as the Court should think fit; and for a receiver.

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The *Solicitor-General* and Mr. G. L. Russell, for the Plaintiff.

Mr. Bethell, Mr. Bacon, Mr. Hare, Mr. Miller, Mr. Batten, and Mr. Bentinck, for the several Defendants; who did not oppose the execution of the trusts of the deed of December, 1848, under the direction of the Court.

Mr. Toller, for the Defendant *Ford*, contended, that the Plaintiff was not entitled to sustain the suit,—arguing, first, that the execution by the Plaintiff of the deed of December, 1848, operated as a release of his judgment; secondly, that the deed of June, 1849, had the effect of merging the Plaintiff's judgment debt; and, lastly, that, supposing the Plaintiff still to be a judgment creditor of *W. A. H. Arundell*, yet he was not therefore enabled to sue on behalf of himself and the creditors, under the deed of December, 1848.

*Lindo v. Lindo* (a) and other cases mentioned in the judgment were cited.

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*May 1st.*  
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*Judgment.*

VICE-CHANCELLOR:

Three questions have, as I understand it, been raised on the part of the Defendant *Ford*, on whose behalf the points in the case have been principally argued. It has been contended, first, that the Plaintiff's judgment was released by the deed of the 27th of December, 1848; secondly, that

it was merged by the deed of the 13th of June, 1849; and, thirdly, that the suit cannot be maintained by the Plaintiff, as on behalf of himself and the creditors, under the deed of the 27th of December, 1848.

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The first point appears to me to depend wholly upon what were the rights of the Plaintiff *Squire* at the time of the execution of the deed of the 27th of December, 1848, and upon the construction of that deed. There cannot, I think, be any doubt, that, at the time of the execution of the deed in question, the Plaintiff *Squire* had a valid charge upon the estate, under the stat. 1 & 2 Vict. c. 110. By the 13th section of that statute, it is expressly provided, "that a judgment already entered up or to be hereafter entered up against any person in any of her Majesty's superior Courts at *Westminster*, shall operate as a charge upon all lands, tenements," &c., "of or to which such person shall, at the time of entering up judgment, or at any time afterwards, be seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all other persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in and out of the said lands, tenements," &c.; "and that every judgment creditor shall have such and the same remedies, in a Court of equity, against the hereditaments so charged, by virtue of this Act or any part thereof, as he would be entitled to in case the person against whom such

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judgment shall have been so entered up, had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon; provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge, until after the expiration of one year from the time of entering up the judgment." There was, therefore, at the date of the deed of the 27th of December, 1848, an existing charge upon the estate in favour of *Squire*, although it could not be enforced in equity, the year not having elapsed. The point, therefore, to be considered is, whether the charge was released by the deed.

In determining this question, the intention of the parties to the deed is, I think, first to be considered; for the Courts are bound, in determining questions of this nature, to pay very great regard to that intention. That doctrine was clearly laid down in the case of *Solly v. Forbes* (a); and that case appears to me to have so important a bearing upon the present question, and so fully expresses the views which I entertain upon it, that I will read some parts of the judgment. In *Solly v. Forbes*, a release was given by the Plaintiffs to *Ellerman*, one of two partners, with a provision that it should not prejudice any claim which the Plaintiffs might have against *Forbes*, the other partner; and that, in order to enforce the claim against *Forbes*, it should be lawful for the Plaintiffs to sue *Ellerman*, either jointly with *Forbes*, or separately. In an action by the Plaintiffs against *Ellerman* and *Forbes*, this release having been pleaded by *Ellerman*, and set out on oyer in the replication, with an averment that the action was prosecuted against *Ellerman* jointly with *Forbes*, for the purpose of enabling Plaintiffs to recover payment of monies due from

(a) 2 Brod. & Bing. 38.

*Forbes* and *Ellerman* to the Plaintiffs, either out of the joint estate of *Forbes* and *Ellerman*, or from *Forbes* or his separate estate, the replication was demurred to, and the demurrer overruled. The Chief Justice *Dallas*, in giving judgment in that case, went very fully into the effect which is to be given to a general release with reference to restrictive clauses which are put upon the release; he says (a), "The circumstances under which this case comes before the Court will appear by referring to the pleadings at large. The general question which arises is, whether the release as set forth constituted a bar to the action. Of the intention of the parties no doubt can be entertained. It was meant to release *Ellerman* as to person and effects, but not *Forbes*; and, therefore, to retain against *Ellerman* every right and remedy necessary to enforce payment from *Forbes*. But so to construe the release as to make it a release of both, which it would be if no action could be brought against *Forbes*, because *Ellerman* could not be joined, would make it operate, not to effectuate, but to defeat the intent of the parties. As little doubt can exist upon the words made use of to effectuate the intent, as upon the intent itself. It is not an absolute and unqualified release, but in terms conditional and provisional, being made subject to an exception; such exception forming part of the same sentence with the words of release, and immediately connecting with and attaching upon them, and introductory to and followed up by a proviso, by which it is expressly declared, that nothing contained in the deed of release shall be taken to release or in any way prejudice or affect any demands of the Plaintiffs, either against the said *John Forbes* separately, or as a partner with *Ellerman*. Now, it would be to release, and in every way to affect the demand against *Forbes* as partner with *Ellerman*, to give such operation to the release as in effect to make it a re-

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Principles of the Court in giving effect to the intention of the parties to a general release, with reference to the restrictive clauses which it contains, or to the purposes for which it is made.

(a) Id. 46.

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lease to both, by making it a bar to an action, in which, for the recovery of a joint debt, both must be jointly sued. Nor does this even rest on negative, though necessary, construction; for, in a subsequent part of the deed it is expressly provided and declared to be the true intent and meaning of the release, that it shall be lawful for the Plaintiffs to commence and prosecute any action against the said *Abraham Ellerman* jointly with the said *John Forbes*, for the recovery of the joint debt due from them; and this is a joint action for the recovery of such debt, being therefore an action expressly and in direct terms authorised by the deed of release itself. But against this, objections of a technical and artificial nature have been raised, and we have been referred to many cases, in which it has been held, that a saving or condition repugnant to the nature of the grant is void, and that the grant remains absolute and unqualified, the condition no way operating in restraint of the grant. It is not necessary to pursue these cases into their detail: they are all cases of notoriety, the law of which is not to be disputed; and the only question is upon their application. But with respect to them all I would observe, that in one of the cases cited at the bar it was correctly stated, that the rule of construction in modern times has been more equitable than formerly; Courts looking rather to the intention of the parties than to the strict letter, not suffering the latter to defeat the former, but in certain cases of exception, to which it is not now necessary to refer. Taking these cases, however, such as they are, the application sought to be established is altogether fallacious. It is assumed that wherever the word 'release' is made use of, it must operate absolutely and unconditionally, though immediately and in the same sentence followed by words which shew it to be partial and particular only, and the general words being in no respect repugnant to the special words, but the latter a qualification merely of the former, leaving the release to operate

to every purpose, except to the exclusion of the particular purpose which the parties have declared it to be their intention it shall not exclude. This being apparent, both in terms and meaning, what are the rules of law which apply, narrowing them to the particular point? I pass over the general and leading principle, that the intent of the parties shall prevail as far as by law it may; and, further, that Courts will be anxious so to construe the law, as to give effect to that intent, provided it do not contravene any fundamental rules of the policy of the law. If a deed can therefore operate two ways, one consistent with the intent and the other repugnant to it, Courts will be ever astute so to construe it as to give effect to the intent; and the construction, I need not add, must be made on the entire deed. The passage cited at the bar is to this effect material: 'I exceedingly commend the Judges (said Lord *Hobart*) that are curious and almost subtil to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act (a);' and it has been correctly added, that, in the case of *Crossing v. Scudamore* (b), Lord *Hale* cites and approves of the passage in *Hobart*, which is again referred to by *Willes*, C. J., in the case in 2 *Wilson* (c), and is cited, to be approved of and to be governed by, in many other cases. Not to go through all the authorities which are to be found, it will be sufficient to select one or two only, and these will refer to the rest. In *Morris v. Wilford* (d), it was expressly decided, that a release shall be construed according to the particular purpose for which it was made. *Jones*, *Wylde*, and *Twisden*, Justices, were of opinion, on the first argument, that the release is no bar, notwithstanding the general words; for, being made for particular purposes,

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(a) *Earl of Clanrickard's case*,  
Hob. 277.

(b) 1 Vent. 141.

(c) 2 Wils. 75.

(d) 2 Show. 47.

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the general words are to be guided by the particular purposes. *Rainsford*, C. J., *contra*. The case was argued a third time, when by the whole Court judgment was given for the Plaintiff. In *Payler v. Homersham* (a), Lord *Ellenborough* adopts the position, that the general words of a release may be restrained by the particular recital. 'Common sense,' said his Lordship, 'requires that it should be so; and in order to construe any instrument truly, you must have regard to all parts, and especially to the particular words of it.' The case in *Rolle* to this effect, though said to have been denied by Lord *Holt* to be law, 'seems to me,' said Lord *Ellenborough*, 'as sound a case as can be stated.' And Mr. Justice *Bayley* adds, 'There is no doubt but a particular recital in a deed will restrain the general words.'"

There we get the principle very distinctly laid down, which is to govern the Court in construing releases with exceptions. Following that principle, I have to ascertain the intention of the parties to this deed, with reference to the release of the charge; and I think the intention is principally, and indeed almost wholly, to be collected from the releasing clause with the several provisoes attached to it. The releasing clause has three branches: The first branch releases all actions, &c., including judgments, claims, and demands, which the creditors, parties to the deed, had or might thereafter have in respect of their debts; and no doubt, if that clause had been uncontrolled, it must have released this judgment. But, it terminates with the proviso, "that the present covenant shall not operate upon any mortgage, pledge, lien, or other specific security, which any creditor now possesses in respect of his debt or debts," distinguishing, it will be observed, between existing and future rights. The second branch of the covenant applies to the case of proceedings by any of the creditors

(a) 4 Mau. & Selw. 423.



before the deed becomes absolute; but it contains an exception as to "mortgages, charges, liens, or specific securities, as aforesaid," again referring to existing rights. The third branch is a general saving, also applying to existing rights. It is clear, therefore, that some existing rights must be saved, and those rights are "mortgages, pledges, liens," &c., as expressed in the first branch of the clause; "mortgages, charges," &c., as expressed in the second branch of the clause; and "charges or liens," as expressed in the third branch.

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Now, reliance was placed in argument upon the words "specific security," as limiting and controlling the effect of the proviso; but it is to be observed, that the security which is referred to by the deed, is a security in respect of the debts; and the lien, therefore, which is referred to, must be a lien in respect of the debts. Then, do the provisos mean to save only specific liens in respect of the debts created by the actual holding of property? The generality of the words is against that construction, and I think the context is against it too; for I observe, that the deed distinguishes between rights against the person, and rights against the property. There is, in the first branch of the clause, the proviso which applies to property,—that it shall not destroy any mortgage, pledge, charge, or lien. There is, in the second branch of the clause, a direct distinction taken between proceedings against the debtor, his heirs, executors, or administrators, and proceedings affecting claims against the property; and there is, in the third branch of the clause, the power to sue persons liable other than *W. A. H. Arundell*, his heirs, executors, or administrators. The very nature of the transaction carried out by the deed, tends to favour the distinction between proceedings against the person, and proceedings against property.

Some argument was founded by *Mr. Toller* upon the

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terms of the recital, that the property was subject to mortgages, and to costs due and to become due to *Cotterill*, and to the charge due and to become due to *Hoggart & Co.*; but I think it is clear, that the words of the provisoes cannot be construed by that recital. I am of opinion, therefore, that the Plaintiff's judgment is not released by the deed of the 27th of December, 1848.

As to the second point, whether the Plaintiff *Squire's* judgment has been merged by the deed of June, 1849, several cases were referred to: *Toulmin v. Steere* (a), *Parry v. Wright* (b), and *Brown v. Stead* (c); but I do not think those cases apply to the present. There is no doubt whatever, that the purchaser of an equity of redemption cannot set up against a second incumbrancer a mortgage which he has got in: that is the decision in *Toulmin v. Steere*. There is equally little doubt, that a prior mortgage may be so dealt with by a subsequent incumbrancer in his dealing with the estate, as to prevent its being afterwards set up by him; which is the case of *Parry v. Wright*. *Brown v. Stead* seems to me to lie half way between *Parry v. Wright* and *Toulmin v. Steere*. The question to be considered with reference to *Toulmin v. Steere* would be, is or is not this debt paid off? It is clear that it is not. It is not payment of the debt by a trustee, but it is an assignment of it, not to the trustees who held the estate, but to the three trustees who are the assignees of the present property. Besides this, it would be going a monstrous length, to say, that the trustees for creditors under the original deed of the 27th of December, 1848, are to be considered as owners of the estate, to bring them within the principle of the case of *Toulmin v. Steere*. They are, I think, in the character of mortgagees or creditors

(a) 3 Mer. 210.

(b) 1 S. & S. 369; S. C. 5 Russ. 142.

(c) 5 Sim. 535.

upon the estate, having a charge upon it for the payment of their debts. I am also quite clear, that this case is out of the principle of *Parry v. Wright*; for it is plain that this debt has not been so dealt with, as to be actually extinguished by the mode in which it has been assigned. I am of opinion, therefore, that the Plaintiff's judgment is not merged by the deed of June, 1849.

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With regard to the third point, the frame of the suit, I think that the judgment is, by the deed of June, 1849, well assigned to the trustees for the benefit of the creditors. The deed of June, 1849, recites the deed of December, 1848, and that the estate and effects were thereby assured and transferred to the parties of the second part, in trust for the benefit of the creditors who should execute the deed,—that a dividend was payable under the deed, and that the Plaintiff had agreed to transfer his judgment debt to the said parties, “as such trustees” for the creditors, and the assignment is then made to the three parties of the second part absolutely, “as such trustees or trustee as aforesaid.” Now, what can that mean, except as trustee or trustees for the general benefit of the creditors, which by the early part of the deed they are said to be? The result, therefore, of the examination of this deed is, that the judgment is thereby assigned to trustees for the creditors. The Plaintiff is one of those creditors, and one of the cestuis que trust of the judgment; he has a right, therefore, as I conceive, to sue on behalf of himself and the others, and has properly framed this suit.

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*May 9th,  
June 3rd.*

A mortgagee of a reversionary interest in stock filing a bill to realise his security, is entitled to a decree for foreclosure in default of payment, that being the ordinary method whereby the Court excludes the right of redemption; and although he may, in some cases, be entitled to a decree for sale, there is no rule or practice of the Court which compels him to submit to such a decree.

### WAYNE v. HANHAM.

**SIR WILLIAM HANHAM**, being entitled to one-third share of two sums of stock, 9900*l.* Reduced Bank Annuities and 9900*l.* Consols, standing in the name of trustees, subject to the life-interest of *Sarah Gyles* in the same stock, executed an assignment of his said third share to *William Foskett*, by way of mortgage, for securing to the latter 2000*l.*, with a power of sale in case of default in payment of the principal monies and interest thereby secured. *Foskett* died; and his personal representatives, after giving the mortgagor notice of their intention to exercise the power of sale, and ineffectually attempting to sell the reversionary interest in the stock comprised in the security, filed their bill against the mortgagor and certain subsequent mortgagees of the said two sums of stock, for foreclosure of the equity of the Defendants therein.

The only question was, whether the Plaintiffs were entitled to a decree for sale or for foreclosure.

#### *Argument.*

*Mr. Kenyon Parker* and *Mr. Hetherington* for the Plaintiffs, asked for a decree of foreclosure. The sale of the reversionary interest was an ineffectual remedy, and might, and probably would, not raise sufficient to satisfy the mortgage debt. In principle, foreclosure was the proper remedy; for why should the mortgagor make default of payment of the debt, and yet, if the mortgagee should happen to be unable to find a purchaser, retain the right of redeeming the security for an indefinite period. The right of the Plaintiffs to foreclose was moreover supported by a direct authority: *Slade v Rigg* (a).

(a) 3 Hare, 35.

Mr. *Freeling*, for the Defendants.—The practice of the Court, until the case of *Slade v. Rigg* (a), was to decree a sale of stock on the bill of a mortgagee: *Ponten v. Page* (b). There was no instance of a decree of foreclosure until that in *Slade v. Rigg*. In *Dyson v. Morris* (c), the Vice-Chancellor *Wigram*, who decided *Slade v. Rigg*, said, there was no doubt that in a case of a mortgage of stock or personal chattels, the remedy of a mortgagee would be by sale. The reasoning in *Slade v. Rigg*, which was founded upon the precedent in *Kemp v. Westbrook* (d), that the dismissal of a redemption bill in default of payment operated as a foreclosure, and therefore that foreclosure was the proper remedy in the converse case of a bill by the mortgagee, was not accurate. The effect or result of the bill in one case afforded no authority for the same conclusion in the contrary case. The analogy of the case of real estate did not hold. A mortgage of real estate conferred no power of sale; but a mortgage of stock or personal chattels gave the mortgagee the right of absolutely disposing of the property comprised in the security: *Tucker v. Wilson* (e), *Lockwood v. Ewer* (f), *Kemp v. Westbrook* (g).

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VICE-CHANCELLOR:—

The question in this case was, what was the proper form of decree upon a bill of foreclosure by a mortgagee of a reversionary interest in stock? Whether, upon default of payment, the decree should direct a foreclosure or a sale, the Plaintiff, the first mortgagee, desiring foreclosure, and the Defendants, a second mortgagee and the mortgagor, insisting upon a sale.

June 3rd.  
Judgment.

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|---|-----------------------------------|
| (a) 3 Hare, 35.   | (e) 1 P. Wms. 261; S. C., 5       |
| (b) Before V. C. <i>Plumer</i> , 7 Nov. 1816, 1 Madd. Ch. Pr., 3rd edit., p. 664. | Bro. P. C. 193, Toml. edit.       |
| (c) 1 Hare, 422.  | (f) 2 Atk. 303.                   |
| (d) Seton Decrees, pp. 181, 182.  | (g) 1 Ves. 278; Belt's Supp. 141. |

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I have been furnished with a copy of the decree in *Ponten v. Page* (a). The mortgage in that case was of a contingent reversionary interest in stock, and the decree directs an account to be taken of what was due to the Plaintiff, and, in default of payment, directs a sale of the stock, reserving further directions and costs; but in *Slade v. Rigg* (b) the Vice-Chancellor *Wigram* held, that a mortgagee of a reversionary interest in stock was entitled to the common decree for foreclosure upon default of payment. There is not, I think, any inconsistency in these decisions; for it does not appear that the decree in *Ponten v. Page* was made adversely to the Plaintiff, the mortgagee; but whether it was so or not, I am of opinion, that the proper form of decree was that which was adopted in *Slade v. Rigg*.

There can be no doubt, that upon such a mortgage, as upon other mortgages, the mortgagor has a right of redemption, and the purpose of the proceeding by foreclosure is to exclude that right; and unless it be an established rule or practice of the Court, that the proper mode of excluding it is by directing a sale, I think it must be excluded, according to the ordinary method of the Court, by foreclosure. The mortgagee indeed may in this, as in some other cases, be entitled to a sale; but I do not find any rule or practice of the Court which compels him to submit to it. On the contrary, the cases in which decrees for sale are made at the instance of mortgagees, seem to be considered as depending more on the will of the mortgagee than on any right of the mortgagor; and there is a remarkable instance of this in the Irish cases, where, although the decree in foreclosure suits is invariably for sale, it is held, that the mortgagor cannot maintain a bill for a sale, but only for redemption: *M'Donough v. Shew-*

(a) 1 Madd. Ch. Pr. 664, 3rd edit.

(b) 3 Hare, 35.

*bridge (a) and Drew v. O'Hara (b).* I may add also, that I fully concur in the Vice-Chancellor *Wigram's* observations as to what the justice of such cases requires; and I think therefore there must in this suit be the common decree for account and foreclosure.

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 HANNAM.  
 Judgment.

(a) 2 Ball & B. 555.

(b) *Id.* 562, n. See *Tancred v. Potts*, 2 Fonbl. Eq. 261, n. (f).

### ASKEW v. MILLINGTON.

THE petition of the Defendant *Millington* stated, that the Plaintiffs, *George and James Askew*, filed their bill in December, 1848, against the petitioner *Millington*, and two other persons, named *Gratrix and Hall*, the executors of *James Chambers*, praying that *Millington* and the estate of *Chambers* might be charged with a sum of 6000*l.*, on the ground of an alleged breach of trust, in neglecting to get in and duly invest a sum of 6000*l.*, secured by the covenant of one *Benjamin Tidswell*, and of which sum or covenant *Millington* and *Chambers* were trustees. That the Defendants had answered the bill, and a replication was filed; and that in a suit for the administration of the estate of *Chambers*, in which *Gratrix and Hall* were Plaintiffs, and *William Chambers* and others were Defendants, the usual directions had been made for the administration of the real and personal estate of *Chambers*.

May 12th.  
 13th, & 27th.

The Court, upon a petition to enforce an agreement entered into by the parties to the cause, after the cause was at issue, to compromise the suit, refused to dismiss the bill, or to stay the proceedings in the cause.

The petition then stated, that, since the cause was at issue, a long correspondence had taken place between the solicitor of the Plaintiffs and the solicitors of the petitioner, in reference to a compromise of the suit; and that such correspondence, after being broken off, was renewed on the 19th of July, 1850; and the petitioner's so-

bill for specific performance, and not by interlocutory application in the existing cause: —  
*Semble.*

The proper proceeding to enforce an agreement for the compromise of a suit, where such agreement goes beyond the ordinary range of the Court in such suit, or where the Court has, in enforcing the agreement, to adjudicate on equities distinct from the equity appearing on the record in the cause, is, by

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 —  
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solicitors, on the 23rd of July, left with the Plaintiffs' solicitor the following proposals for the settlement of the suit *Askew v. Millington*: "That the bill be dismissed with costs; that Mr. *Millington* shall pay all the costs of the Defendants; that the Plaintiffs shall pay their own costs; that Mr. *Millington* shall pay to the Plaintiffs the sum of 500*l.*; that Mr. *Millington* shall, at the Plaintiffs' expense, take in a charge against the estate of Mr. *James Chambers*, in the suit *Gratrix v. Chambers*, in respect of the trust monies and interest owing to the Plaintiffs, and shall use his best endeavours to substantiate the greatest claim that can legally be admitted; that, from the first monies to be received by Mr. *Millington* from the estate of *James Chambers* in respect of such proof, Mr. *Millington* shall retain the sum of 500*l.* in repayment of the above sum of 500*l.*, and also interest thereon at 4*l.* per cent., and also the sum of 100*l.* in part payment of the costs of the Defendants in this suit; that Mr. *Millington* shall undertake that the Plaintiffs shall receive the whole amount of the sum for which he may be allowed to prove as aforesaid against *James Chambers'* estate (after deducting the said sum of 500*l.* and interest, and 100*l.* from *James Chambers'* estate, at the distribution thereof, and shall pay to the Plaintiffs the deficiency. That no proceedings shall be taken against Mr. *Millington* until the deficiency shall be ascertained; that the balance of the trust monies in Messrs. *Lloyd, Entwistle & Co.'s* bank, and any monies to be received from *Tidswell's* estate, shall belong to the Plaintiffs, after deducting therefrom Messrs. *Cunliffe & Co.'s* accounts against them and their trustees, amounting to £—. These proposals are submitted without prejudice in any way to Mr. *Millington*, if not accepted."

The bill then stated a letter from the solicitor of the Plaintiffs to the solicitors of *Millington*, dated the 2nd of August, agreeing to the proposals, save that 50*l.* should be deducted by *Millington*, instead of 100*l.*, for the costs;



and a letter from the solicitors of *Millington* to the solicitor of the Plaintiffs, dated the 13th of August, accepting this modification of the terms, and adding, "the suit may therefore be considered at an end." The petition alleged, that these two letters constituted a valid and binding agreement for the compromise of the suit.

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The petition then stated, that *Millington's* solicitors prepared the draft of an agreement for the compromise, and the Plaintiffs' solicitor also prepared a draft for the same purpose; but to the latter draft the executors of *Chambers* were made parties. After some further correspondence on the subject of making the executors of *Chambers* parties to the agreement, which the Defendant's solicitors contended was not contemplated by the agreement, and the Plaintiffs' solicitor insisted upon, the latter, on the 26th of October, wrote to the solicitors of *Millington*, that, unless he received a draft of an agreement, making the executors of *Chambers* parties, within a week, he should consider the negotiation again at an end, and proceed with the suit. On the 30th of October, the solicitors of *Millington* sent the draft, but declined to make the executors of *Chambers* parties. On the 15th of November, the Plaintiffs' solicitor returned the draft to *Millington's* solicitors, observing that the transmission of it, under such circumstances, was useless; and that the suit should proceed with all practicable despatch. On the 19th of November the cause was set down for hearing.

The petition alleged, that the cause had been set down in contravention of the arrangement and compromise, and prayed that the bill might be dismissed without costs as against the petitioner, and with costs as against the other Defendants, the petitioner being willing and thereby undertaking to perform the agreement for compromise on his part in all respects.

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Argument.

Mr. *Bethell* and Mr. *Renshaw* for the petition.

The agreement for the compromise of the suit is not denied. The only question raised on the part of the Plaintiffs is, whether, in order to carry into effect that agreement, any act is to be done by third parties, that is, by the executors of *Chambers*. That is a distinct question, not affecting the agreement itself, but merely the mode of effecting it; and it is a question which the Court can determine upon this petition. There is nothing connected with the agreement which is not within the jurisdiction of the Court. The Court may dismiss the bill, and impose such terms on the petitioner as it may deem fit; or, if there were difficulty in enforcing the agreement upon petition, the Court might restrain the proceedings in the suit for a limited time, upon an undertaking on the part of the petitioner to file a cross bill for the specific performance of the agreement. If the agreement had been made before answer, the Defendant might have pleaded it, and the Court would not, in that case, have required a cross bill to raise the question; nor would the Court in this case require that circuitry. Authority, as well as the practice of the Court supported the proceeding in such a case in a summary way, by petition in the cause: *Rowe v. Wood* (a), *Tebbutt v. Potter* (b).

Mr. *Stuart* and Mr. *Baggally* for the Plaintiffs contended, that the Court would not interfere by an interlocutory proceeding to enforce an agreement; and that if the Defendant had any right, under the alleged agreement, to the assistance of the Court, he could only enforce it by a suit. They contended, moreover, that the agreement was not capable of being the subject of specific performance, from the vagueness of its terms, the effect of which it was evident the parties had not themselves known. They cited *Wood v. Rowe* (c), *Forsyth v. Manton* (d).

(a) 1 J. & W. 315, 337.

(b) 4 Hare, 164.

(c) 2 Bligh, 595, 617.

(d) 5 Madd. 78.

Mr. *E. Bury* for the executors of *Chambers*.

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VICE-CHANCELLOR :

The Defendant *Millington* has presented a petition in this cause, praying that the cause, which is alleged to have been set down in contravention of an arrangement and compromise, may not be heard; and that, in pursuance of the agreement and compromise, the bill may be dismissed without costs as against the petitioner, and with costs as against the other Defendants, the petitioner undertaking to perform the agreement for compromise on his part in all respects. In effect, the petitioner prays the specific performance of an alleged agreement for the compromise of the suit. Upon the petition being opened, it occurred to me that the specific performance of such an agreement could not possibly be ordered in the existing suit, but must be the subject of a further suit; and, in support of this view, the cases of *Forsyth v. Manton* and *Wood v. Rowe* were cited on the part of the respondent. On the other hand, the petitioner relied on the dicta in *Rowe v. Wood*, and on the decision in *Tebbutt v. Potter*.

The course to be pursued in cases of this nature not appearing to be well settled by these authorities, I have searched for further cases upon the subject, but I have not been able to find any others reported. I have found, however, the precedent of a bill which was drawn by the late Lord Chancellor, in the year 1820, and which, I think, goes far to shew what, in such cases, is the proper course of proceeding. In that case, the original suit was between partners for the accounts of the partnership, and a decree had been made for the accounts, and, after the decree, an agreement for compromise was entered into; and the Plaintiff in the original suit having refused to carry out the compromise, and proceeded in the suit, the bill was filed

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for the specific performance of the agreement, and for an injunction to restrain the original Plaintiff from further prosecuting the suit; and my recollection of the case enables me to add, that this course of proceeding was the result of a previous motion in the original suit to stay proceedings having been refused by the Court. This case, and the case of *Forsyth v. Manton*, and what fell from Lord *Redesdale* in *Wood v. Rowe*, appear to me to establish, that, at least in cases where the agreement of compromise goes beyond the ordinary range of the Court in the existing suit, and the right to enforce the agreement in that suit is disputed, the proper course of proceeding for enforcing it is by bill for specific performance, and not by motion or petition in the original suit to stay the proceedings; and I think that, *a fortiori*, this must be the case where the agreement itself is disputed.

In *Tebbutt v. Potter*, in which the Court appears to have interfered on motion, the only question considered by the Court seems to have been, whether the Plaintiff should be permitted to dismiss his bill without costs, and the case appears to have been argued with reference to the authorities upon that point. The difficulty arising from enforcing part of the agreement, when other parts of it did not fall within the range of the suit, does not appear to have been presented to the Court; and certainly no question was raised as to any part of the agreement not being binding. Lord *Eldon's* observations, in *Rowe v. Wood* (a), had reference probably to the position of the Defendant, who was liable to an immediate attachment, and might therefore be well warranted in applying to the Court to stay proceedings, though his ultimate course would be by bill for specific performance.

On principle, too, I think that the proceeding by bill is

(a) 1 J. & W. 337 et seq., 345.

more correct; for it is obvious that the Court, in trying such matters upon an interlocutory application in the original suit, is called upon to adjudicate on affidavit upon matters depending on equities wholly distinct from the equity appearing upon the record in the cause. I am of opinion, therefore, that the petitioner in this case has adopted a wrong course of proceeding, so far as he seeks by this petition to have the agreement for compromise carried out. It may indeed be said, on his part, that all which he requires is, that the bill should be dismissed, and that this is clearly within the power of the Court in this suit; but the question is not, what the petitioner requires, but what in justice ought to be done; and this must depend, not upon part of the agreement, but upon the whole agreement; and if the Court cannot see that the whole agreement can be enforced against the petitioner in this suit, it must, I apprehend, enforce part of it in his favour.

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—  
*Judgment.*

The difficulty in enforcing the agreement in this suit was, I think, felt on the part of the petitioner, for, in reply, it was proposed that the order should be to stay the proceedings in the original suit, upon an undertaking to file a bill for specific performance of the agreement; but I see no ground for such an order being made. The petitioner might have filed a bill without presenting this petition, and he may now do so. He wants no leave of the Court for the purpose; and there was not, when this petition was presented, any ground of apprehension, rendering it necessary to make immediate application to the Court; but, independent of these considerations, I should not interfere upon this question, for, I think, that, upon the merits, the Court would not, even upon a bill filed, be justified in staying the proceedings in the original suit.

The case stated by the petition is, that, after a previous treaty for compromise, which failed, certain proposals were

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delivered on the part of *Millington*, on the 23rd of July, and were accepted on the part of the Plaintiffs, with a modification in one particular, by a letter dated the 2nd of August, and such modification was agreed to on the part of the Defendant, by a letter of the 13th of August; and that these proposals and the two letters constitute a binding agreement, which the Court would enforce. I am much disposed to think, that the proposal and letters do constitute an agreement; but I think it is an agreement of which the Court would not decree a specific performance. I do not see how this agreement could be enforced against the petitioner. How could the Court compel him to do the best in his power to establish the largest amount of debt against the estate of *Chambers*? Again, it is distinctly sworn upon the part of the respondents, that the agreement was entered into under the apprehension, that the executors of *Chambers* were to be parties to it; and I apprehend that agreements entered into under mistake or misapprehension will not be enforced by the Court, more particularly, when, as in this case, the agreement is entered into by an agent; and even assuming, that a case for specific performance may ultimately be made out, I think that the case for the injunction would fail. [His Honor read the letters of the 26th and 30th of October, and of the 15th of November.] No step was taken on the part of the petitioner to enforce the agreement, until the 9th of December. The petitioner might have proceeded to enforce the alleged agreement early in November; and I think, that, under the circumstances of this case, it was his duty to have done so, if he meant to rely upon it. For these reasons, I am of opinion, that the petitioner's case fails upon the merits, as well as upon the form of proceeding; and that this petition must be dismissed, and dismissed with costs.

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SPICKERNELL v. HOTHAM.

May 10th.

A CREDITOR'S claim to administer the personal and real estate of *G. V. Drury*, deceased, against the executors and devisees in trust of the real estate, (alleged by the claim to be competent to sell and give discharges for the proceeds of the sale and the rents and profits of the estate), and also against the infant heir-at-law of the testator.

In a creditor's suit, seeking the application of real estate in the payment of debts, both the heir-at-law and devisees of the debtor being parties, and the will not being admitted by the heir,—the Court would neither dismiss the bill against the heir, nor direct an issue devisavit vel non at his request,—the right of the creditors being paramount.

The execution of the will was proved by the affidavit of one of the attesting witnesses; and the produce of the real estate was thereby charged with the payment of debts. An affidavit of the Plaintiff's solicitor stated his belief, that the infant Defendant was the nephew and heir-at-law of the testator; and that the mother and guardian of the infant had represented him to be so, and application had been ineffectually made to her to prove the fact by affidavit.

Mr. *Prior*, for the Plaintiff, asked for the usual decree in a creditor's suit seeking payment out of real estate in default of personalty.

Argument.

It was stated that the heir-at-law had been made a party, on the ground that on his part it was suggested that the will had been unduly obtained.

The *Solicitor-General*, for the devisees in trust.

Mr. *Walker* and Mr. *Renshaw*, for the heir-at-law, submitted, that taking the statement as to the devise to be true, the heir-at-law was not a necessary party, and that the bill ought to be dismissed as against him; a title to

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relief as against the devisees of the whole real estate was inconsistent with a title to relief as against the heir: and on the other hand, if the heir-at-law were a necessary party, he was entitled to an issue devisavit vel non, or the effect might be to establish the will against him, without affording him the means of defence.

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*Judgment.*

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The VICE-CHANCELLOR held, that the heir-at-law was not entitled, in a creditor's suit, to an issue devisavit vel non. Such an issue would be idle, as the creditors had a title paramount to that of the heir or the devisees; and the question of the validity of the will as between them could not affect the rights of the creditors. And without dismissing the bill against the heir, the common order was made.

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*Minute.*

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DECLARE, that all the persons who are creditors of *G. V. Drury* are entitled to the benefit of the order. Refer it to the Master to take an account of what is due to the Plaintiff and all other the creditors of the testator, and of his funeral expenses: and let the Master take an account of the personal estate of the testator come to the hands of the Defendants, the executors &c.: and let the said personal estate be applied in payment of his debts and funeral expenses in a due course of administration. And in case the testator's personal estate shall not be sufficient for that purpose, the Master is to inquire and state, whether the infant Defendant *Richard Drury* is the heir-at-law of the testator; and if he shall find that the said Defendant *Richard Drury* is such heir-at-law, then the Master is to inquire and state of what real estate the testator was seised or possessed at the time of his death, and to take an account of the rents and profits of such real estates received by the Defendants, the devisees in trust, and thereout the Plaintiff and the testator's other creditors are to be paid what shall be remaining due to them. Reserve further directions and costs.



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## STOKES v. SALOMONS.

May 13th.

**A** SPECIAL case.—The Plaintiff was the vendor of a copyhold estate, which he had purchased from *William Langford Jenkins*, who derived his title to the same from the will of *William Jenkins*. The Defendant had contracted to purchase the copyhold estate from the Plaintiff. The question was, whether it passed by the will of *W. Jenkins*, which was dated in September, 1839, and was in the following words:—"I give, devise, and bequeath all my estate and effects whatsoever and wheresoever, and of what nature or kind soever the same may be, unto *W. L. Jenkins*, now at the school of the Rev. Mr. Butler, at Brighton, such estate and effects to be paid, assigned, or transferred unto the said *W. L. Jenkins*, upon his attaining the age of twenty-one years; and in the meantime and until he shall attain such age, the interest, dividends, and proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as in the discretion of my executors shall be necessary for the purpose, to be applied towards the maintenance, education, and putting forth in the world of the said *W. L. Jenkins*. And I appoint *Edmund Weyman Wadeson*, of &c., and *Richard Green*, of &c., executors of this my will, and guardians of the said *W. L. Jenkins*; and I authorise them to invest my said estate and effects on real or personal security, as to them shall appear advisable, and to alter, vary, and transpose the investment thereof according to their discretion, from time to time." [Power to the executors to reimburse their expenses out of the said estate and effects; and proviso that each should be

A will, made after the Wills Act, 1 Vict. c. 26, whereby the testator gave, devised, and bequeathed all his estate and effects whatsoever and wheresoever, and of what nature or kind soever, to A., to be paid, assigned, or transferred to him, on his attaining twenty-one:—

*Held*, to pass real estate (copyhold of inheritance) subsequently acquired, notwithstanding a direction in the will, that, in the meantime, the executors should apply the interest, dividends, and proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as they should think necessary, in the maintenance, education, and putting forth of A. in the

world, and should invest the said estate and effects on real or personal security at their discretion.

The directions applicable only to personal estate may, in such a case, be construed as referring not to the whole subject-matter of the gift, but to such portions of the estate as may consist of personality, to which such directions may be fitly applied.

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answerable for his own acts only; and that their receipts or those of the survivor should be effectual for all purposes.] "And I give and bequeath unto my said executors a legacy of 100*l.* each; and in the event of the said *W. L. Jenkins* not attaining the age of twenty-one years, I give, devise, and bequeath unto them or the survivor of them all my aforesaid estate and effects." Subsequently to the date of the will, the testator became seised of the estate in question, which was copyhold of inheritance. After the death of the testator, *W. L. Jenkins* attained twenty-one years of age, and was, as devisee, admitted tenant of the estate; and upon his sale to the Plaintiff, the Plaintiff was admitted tenant.

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Argument.

Mr. *Greene*, for the Plaintiff, argued, first, that the will being subsequent to the statute 1 Vict. c. 26, the circumstance, that the copyhold estate was acquired after the date of the will, was immaterial. A general devise of real estate would operate on all the real estate to which the testator was entitled at the time of his death. The only question, therefore, was, whether the devise of the testator's "estate and effects," was sufficient to pass the real estate. Many cases had established, that the word "estate" is sufficient of itself to pass real estate: *Doe d. Evans v. Evans* (a), *Ford v. Ford* (b), *Doe d. Hick v. Dring* (c), *Woollam v. Kenworthy* (d), *Tanner v. Wise* (e), *Doe d. Wall v. Langlands* (f). Was there then anything in the context to abridge the effect of the general words? The word "pay, assign, and transfer," were not unmeaning when applied to the real and personal estate collectively. The real estate might be and

(a) 9 Ad. & E. 719.

(b) 6 Hare, 486.

(c) 2 M. & Selw. 448.

(d) 9 Ves. 137.

(e) Cas. t. Talbot, 284; S. C.,  
 3 P. Wms. 295.

(f) 14 East, 370.

ought to be transferred by the proper and legal forms of transfer, and so much of the property as consisted of personalty, might be paid or "invested." There was nothing, therefore, in the context which could deprive the word "estate" of its most extensive effect. Such an effect had been given to it, notwithstanding that it was accompanied by words applicable to personal estate, in the case of *Saumarez v. Saumarez* (a), and in a late case of *Morrison v. Hoppe* (b).

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Mr. *J. Templeton Wood*, for the Defendant, conceded, that, so far as related to the circumstance of the estate having been acquired after the date of the will, there was no objection to the title; but contended, that, upon the language of the entire will, the real estate could not be held to pass. The word "estate" must be read as explained by the context: *Mayor &c. of Hamilton v. Hodsdon* (c), in which Lord *Brougham*, speaking of *Doe v. Buckner* (d), said, "the words were held insufficient to carry real estate, not as being in themselves insufficient to pass land, but on the context of the will, personal estate only being in the contemplation of the testator;" and the authority of the same case was acknowledged by Lord *Cottingham*, in *Saumarez v. Saumarez* (e). The case of *Newland v. Marjoribanks* (f) is not distinguishable from the present. The words there were sufficient to pass real estate; and the point, whether the words "to invest the same on security" could be read as a direction to invest so much of the same as should consist of personalty, was expressly discussed; and Sir *James Mansfield* distinctly held, that the direction to invest must be read as applying to the whole subject-matter of the will, and was inapplicable to

(a) 4 My. & Cr. 331.

(b) Before the Vice Chancellor  
*Knight Bruce*, 14th Feb., 1851.

(c) 6 Moo. P. C. Cas., 76, 84.

(d) 6 T. R. 610.

(e) *Ubi supra*.

(f) 5 Taunt. 268.

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real estate. There are numerous authorities, which, in like manner, abridge the meaning which might otherwise be given to the word "estate:" *Doe d. Spearing v. Buckner* (a), *Doe d. Hurrell v. Hurrell* (b), *Sanderson v. Dobson* (c), *Woollam v. Kenworthy* (d). In the case of *Saumarez v. Saumarez* (e), the testator had devised his real estate to his son for life, and therefore had clearly manifested his intention of dealing with his real estate. The word "transfer," which might possibly, in popular language, have a more extensive signification than was commonly given to it in technical forms of expression, has a particular sense affixed to it in this will, by the direction that it shall take place on the legatee's attaining twenty-one: that confines its application to the property invested or standing in the names of trustees.

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VICE-CHANCELLOR:

*Judgment.*  
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The case has been so fully and fairly argued, that I may at once give my opinion upon the construction of this will. I feel satisfied, both from the cases which have been cited, and from my own recollection of the authorities upon the point, that no general rule, applicable to every case, can be laid down. In each case the question, whether real estate does or does not pass under the general words of a will, must be determined from the intention of the testator as expressed in the will. All that can be done is, to collect the intention from the whole will; and, for that purpose, it is the duty of the Court to examine every clause of the will, and apply to it those general rules of construction which the Court has adopted.

Now, it is a well-established rule of construction, that

- (a) 6 T. R. 610.  
 (b) 5 B. & A. 18.  
 (c) 1 Exch. 141.

- (d) *Ubi supra*.  
 (e) *Ubi supra*.

full effect must be given to general words, unless it is clear that such effect is controlled by the context. It appears, that the will in this case was made after the passing of the Wills Act (1 Vict. c. 26), and with a knowledge, therefore, of the provisions of that Act; for the testator must be presumed to have had that knowledge: he must, therefore, be presumed to have known, that if he used general words of disposition applicable to real estate, and competent to pass such estate, those words would operate upon all the real estate of which he might die seised, although he had not a single acre of land belonging to him at the time of making his will. Bearing in mind then, that, at the time he wrote, the testator knew, or must be considered as having known, that any future acquired real estates would pass by any general words he might use, which were large enough to embrace them, let us see what are the dispositions of this will. The testator says, first, "I give, devise, and bequeath,"—the word "devise" being a word of itself applicable to real estate. He proceeds, "all my estate and effects whatsoever and wheresoever,"—the word "wheresoever" pointing to locality, and being, therefore, peculiarly applicable to real estate. He does not stop there, but goes on to say "of what nature and kind soever the same may be." A clear intention therefore appears from the general words used in the will, to pass all the property wheresoever and of whatsoever nature, and to give it to *W. L. Jenkins*. The words I have now referred to, if standing by themselves, would undoubtedly pass real estate.

There are then other words which, it has been contended, operate to control those general words. The will proceeds by directing, that the testator's estate and effects are to be "paid, assigned, and transferred" to *W. L. Jenkins* on his attaining the age of twenty-one. No doubt the words "pay, assign, and transfer," in their ordinary sense, apply

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rather to personal than to real estate; but they are not necessarily confined to personal estate. It is clear that real estate may be said to be transferred by any conveyance by which it passes from one owner to another. The testator then, after directing the estate and effects to be paid, assigned, or transferred to *W. L. Jenkins* on his attaining twenty-one, goes on to speak of "the interest, dividends, and proceeds of such estate and effects." I may observe that the word "proceeds" would clearly include both real and personal estate. He directs "the interest, dividends, and proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as in the discretion of my executors shall be necessary for the purpose, to be applied towards the maintenance, education, and putting forth in the world of the said *W. L. Jenkins*." These are the words which, I confess, in the first instance embarrassed my mind, and which, but for the case of *Saumarez v. Saumarez*, I should have felt some difficulty in getting over. The words "so much of the principal thereof" cannot be applied to real estate. By those words most of the difficulty which I felt during the argument was created. The testator then goes on to appoint executors of his will, whom he names guardians of *W. L. Jenkins*; and he authorises them "to invest his said estate and effects in real or personal security." Upon those words another difficulty arises, the same as the difficulty on the word "principal," and one which must be answered in the same manner. Then follow the other words, which have been commented upon,—"I direct my executors to repay and reimburse themselves out of my said estate and effects." I think that may apply both to real and personal property. There is nothing more in the will, except that in the event of *W. L. Jenkins* not attaining the age of twenty-one, the testator gives, "devises," and bequeaths all his aforesaid estate and effects to his executors.

Nothing can be more clear upon this will, than that the testator did not intend to die intestate as to any portion of the property belonging to him, at the period either of his will or of his death; and there are words occurring in the will, and in the devising clauses, peculiarly applicable to real estate, and which are undoubtedly competent to embrace such estate.

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The first case cited on behalf of the defendant was *Newland v. Marjoribanks* (a). There the devise was of the residue and remainder of the testator's estate, of what nature or kind the same might be, and of which he might be possessed or interested in at the time of his decease. Now, the word "possessed" is peculiarly applicable to personalty, and a gift coupled with that word would, *prima facie*, imply personal estate. The next case cited was that of *Doe d. Spearing v. Buckner* (b). There the words are "all the rest, residue, and remainder of my estate and effects, of any and what nature or kind soever, I give and bequeath the same unto" A. and B., "their executors or administrators." That is a devise of the property coupled with a limitation, which shews, *prima facie*, that personal property is meant. The next case cited was that of *Doe d. Hurrell v. Hurrell* (c), in which again there is a disposition of residue to trustees, "their executors, administrators, and assigns." The case of *Morrison v. Hoppe* (d), was decided the other way. *Woollam v. Kenworthy* (e) seems to have gone on the fact, that there was no devise of the estate or effects in terms. The devise was of the fee farm rents, on formal trusts for sale. The testator directed also the furniture to be sold; and trusts were then declared of the money to arise from the sale of the rents and furniture,

(a) 5 Taunt. 268.

(b) 6 T. R. 610.

(c) 5 B. & Ald. 18.

(d) Before the Vice-Chancellor  
*Knight Bruce*, 14th Feb. 1851.

(e) 9 Ves. 137.

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and from all other his estate and effects, of what nature or kind soever. It was not a devise of the estate and effects, but of the monies to arise from all other his estate and effects. Therefore, in order that the real estate might pass by the words "estate and effects," it was necessary to create a trust for sale in the heir on whom the legal estate descended; but the testator had, in the previous part of the will, created a particular trust for sale of a specific portion of the property; and the Court said, that, where he had intended a sale, he had created a particular trust for the purpose; and that it could not, therefore, be inferred that the testator intended that real estate, not included in the express trust, should be included in the general word "estate," so as to pass thereby.

The case of *Saumarez v. Saumarez*(a) appears to me in principle to govern the present case. There the testator gave to his son *Richard*, his heir-at-law, his freehold lands in *Dorsetshire*, and directed the residue of his property which he might leave at his death to be divided between that son and his two sisters in equal proportions; and that whatever portion might devolve to the son should be placed in the names of trustees, and the interest be paid to him for life; and that after his death the share belonging to him should be divided between his children, and placed in the names of trustees, with a power to employ the interest in their maintenance and education, and a discretionary power to employ a portion of the capital for their advancement and settlement in life; and after each of them should have attained the age of twenty-five, the whole of their share to be transferred to them. The same expression "transfer" occurs there as in the present case. Should his son *Richard* die without issue,

(a) 4 M. & Cr. 331.



the whole of the portion which might have been placed in trust for him was to devolve to the testator's two sisters, during their life, in equal proportions, and, after their death, to their children. Lord *Cottenham* held, that the reversion in fee in the particular estate devised to *Richard*, passed under the disposition of the residue of the property which the testator might leave at his death, notwithstanding there was a specific direction in the will which clearly in terms had reference to personal estate. Why did he so hold? Because the testator had shewn, that he had real estate in his mind by the disposition he had made to his son of a life interest only in that particular real estate. Now, applying that principle to the present case, did not this testator know the provisions of the Wills Act? Did he not know that his real estate would pass by his will if the words would comprehend it? And having that knowledge, does he not use legal words referring to real estate? The case of *Saumarez v. Saumarez* also relieves me from the difficulty which I have felt on the word "principal," and from any difficulty that might be created by the word "transfer;" for there I find the same expressions are used as to transfer, and as to interest being paid to the party to be beneficially interested during his life; and there is the direction, that, after his death, his share shall be divided between his children, and placed in the names of trustees. The word "share," *primâ facie*, would not apply to real estate. Now, if Lord *Cottenham* gets over the difficulty by considering the words as applied to such portion only of the testator's estate as is capable of being taken in that particular mode—on this will, where I find the words "interest, dividends, and proceeds of such estate and effects" to be applied in maintenance, "and so much of the principal," I must adopt the same rule of construction, and consider the words "so much of the principal" as applying to so much or to such portion of

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the estate as will consist of principal applicable to the particular purposes of the gift.

The result is, that, considering the whole will, I find nothing of necessity controlling or confining the meaning of the general word "estate," a term which, in its literal sense, is strictly applicable to real estate. My opinion therefore is, that the copyhold premises in question passed by the will. I have given my opinion upon this will without further reference to the authorities, as the case, like most questions of construction, depends more upon the general spelling of the context than upon the application of any general rule to be gathered from the authorities; and I have done so the more readily from my recollection of numerous instances in which contradictory certificates have been returned by Courts of law, when questions of construction have been referred to them by this Court. Where a general rule can be found applicable to the case in hand, it is the clear duty of the Court to apply it; but ordinarily no general rule can be applied, and the Court can only, having regard to the diversity of expression to be found in wills, carry out the general intention of the testator, as it can collect it from the expressions he has used.

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May 6th.

GRIFFITH v. VANHEYTHUYSEN.

THE bill was brought by *G. S. Griffith* and his brother and sister, who were the parties beneficially interested in a sum of 915*l.* Consols, of which three deceased persons *Smith*, *Plaister*, and *Richard Vanheythuysen* had been the trustees, against the personal representatives of *Smith* and *Plaister*;—*Edward Vanheythuysen* and another, who were new trustees of the same fund, being also defendants. The object of the suit was to charge the estates of *Smith* and *Plaister* with the stock and dividends, or the proceeds of the stock and the interest of such proceeds, as might appear to be most beneficial to the Plaintiffs; and for accounts of the respective estates of *Smith* and *Plaister*, if their representatives should not admit assets.

The bill averred, that *Smith* and *Plaister* had permitted the 915*l.* Consols to be sold by *Richard Vanheythuysen* in 1829, who had applied the proceeds to his own use; that *Richard Vanheythuysen* had appointed one *Hewlett* his executor, but had died insolvent; that *Hewlett* duly administered such estate of *Vanheythuysen* as came to his hands, and died in 1844; that the Plaintiff *G. S. Griffith* had since taken out letters of administration de bonis non of *Richard Vanheythuysen*, but had received nothing as such administrator.

The representative of *Smith* by his answer submitted, that *Richard Vanheythuysen* was the person primarily liable for the breach of trust, if any had been committed; and that his estate ought to be fully and completely represented, so that the whole accounts thereof might be taken in any suit instituted in respect of the said matters; but that the bill was not so framed, and was not properly constituted.

Where several plaintiffs beneficially interested in a trust fund sue the trustees in respect of a breach of trust, and one of such plaintiffs has, in addition to his character as a cestui que trust, become the personal representative of a deceased trustee, who was primarily, or with the other trustees jointly, liable, the suit is improperly framed, and cannot be sustained, notwithstanding it be averred by the bill that the plaintiff has received no assets of the estate of the deceased trustee, and that the trustee died insolvent.

Whether, if the plaintiff, who, in such a case, had become the representative of the accounting party, were the sole Plaintiff in the suit, the objection to the suit could be maintained—*Quære.*

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The *Solicitor-General* and Mr. *Piggott* for the representatives of *Plaister*; and

Mr. *Roll* and Mr. *Giffard* for the representatives of *Smith*, in support of the objection to the suit on the ground of misjoinder.

The plaintiff *Griffith*, as the administrator de bonis non of *Richard Vanheythuysen*, is the representative of the party who committed the fraud: the bill, though it charges the other trustees with the breach of trust, does so only on the ground that they permitted, or did not prevent, the act of *Vanheythuysen*. The party guilty of the wrong cannot be permitted in equity to sue those who are innocently answerable for his conduct. It is not an answer to this objection to say, that *Griffith* combines in himself the character of cestui que trust, as well as that of representative of the trustee; he cannot denude himself of the latter character, or render the combination of the cestui que trusts and the defaulting trustee otherwise than an union of Plaintiffs having conflicting and inconsistent interests, against whom the defendants could have no equity in common: *Jacob v. Lucas* (a), *Lambert v. Hutchinson* (b), *Padwick v. Platt* (c), *Fulham v. M'Carthy* (d), *Shipton v. Rawlins* (e). It is not necessary to discuss the question, whether the representative of *Vanheythuysen* might be dispensed with, on an averment and proof of the insolvency of his estate, as there is no such proof; and the Plaintiffs have moreover affected to make his representative a party, and thereby precluded the argument, that he is not a necessary party: *Fussell v. Elwin* (f).

Mr. *Bagshawe* for the new trustees.

- (a) 1 Beav. 436.
- (b) Id. 277.
- (c) 11 Beav. 503.

- (d) 1 H. L. Cas. 703.
- (e) 4 Hare, 619.
- (f) 7 Hare, 29.

Mr. *Bethell* and Mr. *Follett* for the Plaintiffs.—The rule of the Court requires all persons interested in the subject of the suit to be parties. *Vanheythuysen* having been the trustee who profited by the breach of trust, the Court would not permit the Plaintiffs to follow the estate of the other trustees and omit that of *Vanheythuysen*; but *Vanheythuysen* died insolvent, and had no representative. The argument of the Defendants would place the Plaintiffs in this dilemma,—if they did not procure a representation of the estate of *Vanheythuysen*, they could not proceed, owing to the deficiency of parties; and if they did procure it, they could not proceed for excess of parties. How can the formal character, which the plaintiff *G. S. Griffith* has acquired as administrator of *Vanheythuysen*, disentitle him to recover as one of the cestui que trusts against the estates of *Smith* and *Plaister*, the other trustees? It happens that *Griffith* is not the sole party beneficially interested in the trust fund; but the right to sue cannot depend on the accident of whether a single person or a plurality of parties be interested. *Griffith* might have been the only cestui que trust; and if that had been so, and he had become an executor of a party who had been an executor of *Richard Vanheythuisen*, accepting the office in ignorance that his testator represented *Vanheythuysen*, he would, according to the argument, notwithstanding he received no estate of *Vanheythuysen*, be wholly precluded from suing the other trustees. The bill avers that *Griffith* has received nothing in respect of any estate of *Vanheythuysen*, and there is no issue joined on that point; but taking it that *Griffith* has received, or shall hereafter receive, assets of *Vanheythuysen*, the Defendants may require that he shall submit to account in this suit for such assets; they may examine him in the Master's office in respect of such receipts, or, if assets should be received at some future time, he would be subject to a cross suit for contribution. There would be no difficulty in giving the Defendants all the relief they may be entitled to,

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as against *Griffith*. In the case of *Jacob v. Lucas* the Plaintiffs associated a party in a representative character, having no beneficial interest, with infants who had a beneficial interest. Here the objection is, that the introduction of the representative interest deprives the party of his right to sue in respect of his beneficial interest. In *Lambert v. Hutchinson*, one of the Co-plaintiffs was bound by a settlement of accounts equivalent to a release, and the suit could not proceed, except on the footing of binding all the Plaintiffs by the same settlement: that case depended, therefore, on a different principle.

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VICE-CHANCELLOR :—

*Judgment.*  
 ———

I am called upon to decide the preliminary question, whether the suit is to proceed in its present form; and I think I must allow the objection. The bill is filed by Co-plaintiffs claiming a beneficial interest in the subject-matter of the suit; but one of them at the same time represents the estate of one of the several trustees, who was either primarily or jointly liable with his co-trustees for the breach of trust which is the subject of complaint. In all cases of this character the Court has to consider what decree is to be made. In the case before me, the decree must direct an account of the estate of *Vanheythuysen* received by the Plaintiff *Griffith*. Now, how can such an account be taken as between *Griffith* and his Co-plaintiffs in the suit? There is a direct conflict of interests between *Griffith* as the representative of *Richard Vanheythuysen* and his Co-plaintiffs, to whom he is bound to account in his character of representative.

The foundation of the objection of misjoinder in such cases is, that the suit is so constituted that it may be impossible to take the accounts, and ascertain the relative rights of the parties. Suppose that, in this case, the ac-

counts of the estate of *Vanheythuysen* are directed, and a question should arise on the liability of *Griffith* in respect of that estate, there may be disputed items in his account. It would be the interest of *Griffith* to defend the estate of *Vanheythuysen* against the claims of the other Co-plaintiffs. How, in such a case, could an exception be taken or maintained between the Plaintiffs interested in recovering from *Griffith* the estate of *Vanheythuysen*, and the other Plaintiff *Griffith* himself, the accounting party? The present case does not appear to me to be distinguishable from that of *Jacob v. Lucas* (a). In that case it is quite clear that *Robert Tristram Lucas*, who had administered to the estate of *Stuckley Lucas*, was the party primarily liable, and that his representative had also a concurring interest in the recovery of the trust fund. In the present state of the record, having regard to the authorities, I think the suit cannot be sustained.

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An ingenious argument was founded by Mr. *Bethell*, on the supposition of a suit by a sole Plaintiff, uniting in himself both a beneficial interest and a conflicting interest, in a representative character. It will be time enough to pronounce upon a case of that description when it arises. It is probable that such a case may not be found open to precisely the same difficulty as exists in the present case. The sole Plaintiff, if he were also liable to account as the representative of an accounting party, might submit by his bill to account for the whole fund which he had received, and, thus accounting, he would be answerable to the Defendants for the whole of his receipts. The accounts would be thus finally settled, and the Defendants would not be impeded or embarrassed by any severance of the Plaintiff's interests or liabilities. The case supposed, therefore, should it arise, may not be governed by the same

(a) 1 Beav. 436.

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principles as are applicable to the case now before the Court.

The bill must be dismissed; and as against the Defendants who have taken the objection by their answers, it must be dismissed, with costs.

April 29th &  
30th,

May 13th.

A deed conveying the property of an intestate, upon trusts, in pursuance of an agreement for the division of such property, made soon after the death of the intestate, between his sister and heiress-at-law, her husband, and her illegitimate son, and which agreement was founded on the supposition that the intestate had made a will disposing of his property in favour of the illegitimate son, which will had not been found:—*Held*,

not to be voluntary within the statute of Elizabeth; but supported and enforced against the heiress-at-law and her husband, and also against subsequent purchasers from them for valuable consideration with notice of the trust deed.

Under the agreement and trust deed, other children of the sister and heiress-at-law, both legitimate and illegitimate, besides the child in whose favour it was suggested that a will might have been made, took interests in the property of the intestate; and it was held that the deed was not voluntary as to such other parties, but that they were within the consideration of the family contract.

## HEAP v. TONGE.

**W**ILLIAM HEAP, who died on the 24th of March, 1845, left *Betty* the wife of *James Clough*, his sister and heiress-at-law. *Betty Clough* had four children: *James Heap*, and *Mary* the wife of *John Houghton*, *Ann* the wife of *John Tonge*, and *Sarah Clough*. Of these four children, the two elder (*James Heap* and *Mary Houghton*) were illegitimate.

A few days after the death of *William Heap*, *James Clough* and *Betty* his wife, and *James Heap*, entered into and signed the following agreement:—"An agreement made the 28th of March, 1845, between *James Clough* and *Betty* his wife, and *James Heap*: Whereas *William Heap* departed this life on Monday the 24th of March instant, and was this day interred; And whereas the said *Betty Clough* was his sister, and said *James Heap* his nephew; And whereas it has been expected and believed, that the said deceased would give and leave unto the said *James Heap* a great portion of his freehold property; but it not



being ascertained whether the said deceased died without will or otherwise, and in order to save all litigation and unpleasantness, it hath been agreed between the said parties hereto, (the said *Betty Clough* being the deceased's heiress-at-law,) that all property which may pass to her or her husband, and which belonged to the said *William Heap*, or which may have been left to the said *James Heap* by the said *William Heap*, shall be divided into six several shares; that the said *James Clough* shall take one share, the said *James Heap* a further share, *William Heap*, a son of the said *James Heap*, a third share, and that the three children of *James Clough*, viz. *Mary Houghton*, *Ann Tonge*, and *Sarah Clough*, shall take the remaining three shares; that the rents arising from the property, and the monies arising from the personal estate of the said deceased, shall be divided and paid to the before-mentioned parties, as and when received, in the same proportions. That proper legal documents shall be prepared, as soon as practicable, carrying out the purport of this agreement; and that all expenses to be incurred, shall be liquidated out of the monies to arise from the rents or other the property. And for the true observance of this agreement, each party binds himself to the other in the sum of 500*l*., and agrees to pay the same if he makes default in observing the contents, the same to be recovered in any of her Majesty's Courts at Westminster as and for liquidated damages."

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On the 27th of October, 1845, a deed was executed, of that date, made between *James Clough* and *Betty* his wife, of the first part; *James Heap*, of the second part; and *John Tonge* and *John Mills*, of the third part; and which, after reciting two conveyances of plots of land to *William Heap*, recited the death of *William Heap*, intestate, as it was believed, and without issue, leaving *Betty Clough* his sister and sole heiress-at-law, and also leaving a widow; and that *James Heap* was a nephew of *William Heap*;

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and that it was expected that *William Heap* would give and leave a great part of his property to *James Heap*; and that questions and differences had arisen or might arise between *James Clough* and *Betty* his wife and *James Heap*, touching the estate of *William Heap*, and their respective interests, rights, and titles therein; and that, for the purpose of making an amicable settlement of the respective claims of the said parties, they had lately agreed to convey and assign their respective interests in the real and personal estate of *William Heap* to *Tonge* and *Mills*, upon the trusts thereafter expressed; and it was thereby witnessed, that, in pursuance of the said agreement, and in consideration of the premises, and of 5s. to each and every of them, *James Clough* and *Betty* his wife, and *James Heap*, paid by *Tonge* and *Mills*, the said *James Clough* and *Betty* his wife, and *James Heap*, according to their several and respective shares, estates, interests, rights, and titles whatsoever, and howsoever acquired or derived, whether by will or otherwise, of, in, and to the real and personal property therein mentioned, conveyed and assigned the plots of land comprised in the recited deed, and all other the plots of land, messuages, or dwelling-houses, buildings, lands, tenements, and hereditaments lately belonging to *William Heap*, or wherein he had any estate or interest whatsoever, and all the goods, chattels, and personal estate of *William Heap*, to the said trustees *Tonge* and *Mills*, upon trust to pay to *James Clough* and *Betty* his wife, and the survivor of them, during their, his, or her lives and life, the yearly sum of 25*l.*, by quarterly payments; and upon further trust, to divide the said trust estate and premises, and the rents, profits, interest, and annual produce thereof, into six equal parts, upon trust, as to one of such shares, for *James Clough* and *Betty* his wife, during their lives, and after the decease of the survivor, in trust for *James Heap*, *Mary Houghton*, *Ann Tonge*, and *Sarah Clough*, if they should respectively be living at the death of the survivor of *James Clough* and

*Betty* his wife, and for the issue then living of such of them as should be then dead leaving issue, in equal shares, as tenants in common; and upon further trust, as to two other of such shares, for *James Heap*, his heirs, executors, administrators, and assigns, absolutely; and, as to another of such shares, in trust for *Mary Houghton*, for her life, for her separate use, and, after her decease, upon such trusts as she should by deed or will appoint; and, in default of appointment, in trust for her next of kin, in equal shares; and as to one other of such shares, in trust for *Sarah Clough*, for her life, for her separate use; with a similar power of appointment, and limitation in default of appointment; and as to the remaining sixth share, in trust for *John Tonge*, absolutely. The deed contained powers of leasing, sale, and exchange, and also powers to purchase the widow's interest and to build upon the trust property, and provisions for the change and indemnity of the trustees. The deed was duly acknowledged by *Betty Clough*, pursuant to the statute.

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The case of the Plaintiffs in this suit was founded on the foregoing deed. The adverse interests of the Defendants arose out of the subsequent transactions.

*James Clough*, after the execution of the deed of October, 1845, obtained possession of the title deeds of the estates, and deposited them with his brother, *Thomas Clough*, for securing advances; and on the 11th of February, 1846, he signed and gave to *Thomas Clough* a memorandum of the deposit, purporting to be for a sum of 800*l.* then received. By a deed dated the 20th of January, 1848, duly acknowledged by *Betty Clough*, *James Clough* and *Betty* his wife conveyed part of the estates to *Thomas Clough*, by way of mortgage, for securing advances not exceeding 800*l.*

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By another deed, dated the 18th of March, 1848, and also duly acknowledged, *James Clough* and *Betty* his wife conveyed other part of the estates to *John Bromely*, by way of mortgage, for securing 130*l.* and further advances.

In May, 1848, *James Clough* and *Betty* his wife entered into an arrangement with *Dinah Heap*, the widow of *William Heap*, for securing her an annuity of 44*l.* per annum, in consideration of the release of her dower; and it was alleged, that this arrangement was carried into effect by deeds dated the 29th of May, 1848; and that 45*l.*, part of the consideration for the arrangement, was advanced by *John Tonge* on behalf of *James Clough* and *Betty* his wife, upon the terms of their agreeing to settle the estates upon *Tonge* and his wife, and their children; and that accordingly, by a deed dated the 12th of June, 1848, *James Clough* and *Betty* his wife, in consideration of the 45*l.*, and of natural love and affection for *John Tonge* and *William Clough* a grandson of *James Clough*, conveyed the estates of *William Heap* to *Tonge* and *Greenhalgh*, subject to the mortgages to *Thomas Clough* and *John Bromely*, and to *Dinah Heap's* annuity, and also subject to an annuity of 5*l.* to *John Tonge*, during the lives of *Clough* and his wife and of the survivor of them, upon trusts for the benefit of *James Clough* and *Betty* his wife, during their lives and the life of the survivor; and after the death of the survivor of them, upon trusts, as to one moiety, for the benefit of *John Tonge* and his children, and as to the other moiety, for the benefit of *William Clough* and his children; with an ultimate limitation as to each moiety in favour of *James Clough*.

The bill was filed by *James Heap* and *Mary Houghton*, the two illegitimate children of *Betty Clough*, against *John Tonge*, *John Mills*, *Thomas Clough*, *John Bromely*, *James Clough* and *Betty* his wife, *Ann* the wife of *John Tonge*,

*John Houghton* the husband of *Mary*, *James Greenhalgh*, *James Boardman* the personal representative of *Sarah Clough*, deceased, *Dinah Heap* the widow, and other persons claiming under the alleged settlement of the 12th of June, 1848. The bill prayed that the trusts of the deed of October, 1845, might be performed; and accounts taken of the receipts of the trust property by *Tonge* and *Mills*, and *James Clough*; for the removal of the trustees, and the appointment of new ones; and for a receiver; and the bill also prayed an injunction to restrain *Thomas Clough* and *Bromely* from pledging or parting with the title deeds of the property.

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The bill alleged, that *William Heap* was greatly attached to the Plaintiff *James Heap*, and had always treated him with great affection, and had induced him and all his relations and connections to believe that he had made a will in *James Heap's* favour, and had made a large provision for him; and that, for some time after the death of *William Heap*, and until after the agreement of the 28th of March, 1845, had been entered into, it was not known whether he had died testate or intestate. It alleged, that the said agreement always remained a binding agreement between the parties until the execution of the deed of the 27th of October, 1845, when the terms of the agreement were modified by that deed to the extent therein mentioned, but not further or otherwise; and it also alleged, that the trust deed was acted upon by the trustees; that *James Heap* for some time received the rents, and paid them over to *Tonge*; and that afterwards *Tonge* himself received some of the rents, but allowed the Defendant *James Clough* to receive a considerable part of them. And with respect to the title deeds, the bill alleged, that, upon the execution of the deed of the 27th of October, 1845, the Defendant *James Clough* stated he wished to take possession of them for a short time; and that he

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would return them in a fortnight at the latest, and deliver them to the trustees; that the title deeds were accordingly delivered to *James Clough*; and that he had not returned them, but had deposited them with the Defendants *Thomas Clough* and *Bromely*. The bill further alleged, that *John Tonge* had improperly delivered the trust deed to the Defendant *Bromely*; and that the Defendants *Thomas Clough* and *Bromely*, when they made such advances as were made by them, knew of the execution of the trust deed of October, 1845, by *James Clough*, and of the nature and extent of his interest under that deed.

The Defendants, *John Tonge* and his wife, answered jointly; and from their answers, passages were read in evidence against *John Tonge*, admitting that the deed of the 27th of October, 1845, was executed in order to carry out the purport and effect of the agreement of March, 1845, with the modifications therein mentioned; and acknowledging also the receipt of rents by the Defendant *John Tonge*, as trustee; and that he delivered the trust deed of October, 1845, to *Bromely*, on the 12th of June, 1848, at the request of the defendants, *James Clough* and his wife. The answers of the same defendants alleged, that it was known before the execution of the agreement of March, 1845, that *William Heap* had died intestate; and also that there was no consideration for the deed of October, 1845. They also stated the arrangement with *Dinah Heap*, and the execution of the deed of the 12th of June, 1848.

The Defendant, *Thomas Clough*, by a passage in his answer, which was read in evidence, stated, that, when he made his first advances to *James Clough*, and, as he believed, when the title deeds were deposited with him, he had no notice of the deed of the 27th of October, 1845; but that, on or about the 21st of December, 1845, the Plaintiff, *James Heap*, told him of the existence of the

deed, and of the nature of the settlement made by it; and that in March, 1846, *John Tonge* shewed him the deed, and read parts of it to him; and from other connected passages in the answer of the same Defendant, which were also read, it appeared that he had made some small advances to the Defendant, *James Clough*, previous to the 21st of December, 1845. This defendant insisted, that both the agreement of March and the deed of October, 1845, were entirely voluntary and without consideration, and were inoperative against his mortgage security. The Defendant *Bromely* denied notice of the settlement of October, 1845.

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The Defendants, *James Clough* and his wife, by a passage in their answer, which was read in evidence against *James Clough*, admitted the receipt of rents by him. Their answer, in other respects, was to the same effect as that of *Tonge* and his wife; and they insisted that the trusts of the deed of October, 1845, ought not to be enforced. *Mills* and *Boardman* admitted the Plaintiffs' case; and *Houghton* desired the trusts of the deed to be performed.

*Greenhalgh*, by his answer, stated, that in May, 1848, he was requested by *James Clough* to allow his name to be inserted in a deed which he and his wife were about to execute, for settling some property which came to his wife from her brother *William Heap*; and that he consented to allow his name to be inserted in the proposed deed; but that he never executed the deed or acted under it; and he disclaimed all interest.

*Dinah Heap* claimed the benefit of the deed securing her annuity of 44*l.*, or in the alternative her dower. The infant Defendants put in the common infants' answers.

Several witnesses were examined on the part of the

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Plaintiffs, and proved that when the agreement was entered into, and even after the execution of the deed, the Defendants *James Clough* and his wife expressed their belief that *William Heap* had made a will in favour of the Plaintiff *James Heap*; they also proved the title deeds to have come into the possession of the Defendant *James Clough* in the manner alleged by the bill. And *William Heap* the son of *James Heap*, who was examined on the Plaintiffs' behalf, disclaimed all interest. The Defendants, the mortgagees, examined *Dinah Heap* the widow, who stated that, before the agreement was entered into, both the Plaintiff *James Heap*, and the Defendants *James Clough* and his wife, knew that *William Heap* had died intestate; and they also proved that the Plaintiff *James Heap* made some inquiry after the will of *William Heap* before the date of the agreement. No evidence was entered into on the part of the other Defendants.

*Argument.*  
 —

Mr. *Russell* and Mr. *Elmsley*, for the Plaintiffs, in support of the deed of October, 1845, as a family arrangement, cited *Stapilton v. Stapilton* (a), where Lord *Hardwicke* held that an agreement, by which an illegitimate son was benefited, was reasonable, and would, if possible, be supported (b); and *Gordon v. Gordon* (c), where Lord *Eldon* said, "where family agreements have been entered into, without concealment or imposition upon either side, with no suppression of what is true or suggestion of what is false, then, although the parties may have greatly misunderstood their situation and mistaken their rights, a Court of equity will not disturb the quiet which is the consequence of that agreement" (d). In these cases the fact of illegitimacy either occurred or was the ground of the agreement (e). In like manner, agreements fairly entered into

(a) 1 Atk. 2.

(d) Id. 463.

(b) Id. 5.

(e) Id. 471.

(c) 3 Swanst. 400.



to divide in a certain manner property which might be left to them by particular individuals, would not be disturbed by the Court: *Harwood v. Tooke* (a), *Wethered v. Wethered* (b), *Beckley v. Newland* (c). The agreement in this case would, in a stronger degree, be favoured by the Court; for, in the class of cases last cited it might be said, that the agreement, being unknown to the testator, was in fraud of his testamentary power, an observation which could not apply to an agreement made after the death of the testator.

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 ———  
*Argument.*

Mr. *Bethell* and Mr. *Follett*, for the Defendants *Clough* and *Bromely*, the mortgagees, contended that the deed of October, 1845, did not purport to be in the nature of a family arrangement, and could not be supported on that ground. In all the cases referred to there had been some consideration for the agreement. The illegitimacy had been doubtful, or the probability at least of an interest had existed. In this case the illegitimacy was known, and the only pretence for a consideration was the possible existence of a will in favour of the party. If such a suggestion were admitted, the cases in which family arrangements might be supported would be extended indefinitely. It would only be necessary to recite, that some instrument might by possibility exist under which the party took an interest, and a consideration would immediately be founded. The deed of October, 1845, moreover, was not founded on the agreement of March, 1845, but differed from it:— It was voluntary, and void as against the Defendants, under the statute 27 Eliz. c. 4, needing, therefore, no cross bill to displace it; or, if not wholly voluntary, yet it was voluntary as regarded the parties claiming under it other than *James Heap*: *Johnson v. Legard* (d); and if it were not to any extent voluntary, the Defendants, the mort-

(a) 2 Sim. 192.

(c) 2 P. Wms. 182.

(b) Id. 183.

(d) T. & R. 281.

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 {  
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 —  
*Argument.*

gagees, were purchasers without notice of the Plaintiffs' title, and the Court would not act against them, either in respect of the estate or of the title deeds: *Head v. Egerton (a)*.

Mr. Terrell, Mr. Taylor, and Mr. Kinglake, for other Defendants.

*May 13th.*  
 —  
*Judgment.*

VICE-CHANCELLOR (after stating the facts as they appeared on the pleadings, and the evidence adduced by the Plaintiffs, and by the Defendants the mortgagees):—

Looking at the evidence on the part of the Plaintiffs and the acts of the parties, the evidence of *Dinah Heap* cannot, I think, be relied on to the extent to which she has carried her statement, more particularly as she states no single fact from which she has drawn her conclusion; and the evidence as to inquiry by *James Heap*, proves that he, at least, expected that there was a will in his favour. There being no evidence on the part of the other Defendants, as against them the Plaintiffs are clearly entitled to a decree; for the legal estate being transferred by the deed of October, 1845, the trusts declared by that deed are well created. The deed, even if it were voluntary, must bind the Defendants, *James Clough* and his wife, and all volunteers claiming under them; and the Court could not refuse to execute the trust, so long as it remains unimpeached, because the deed might be open to impeachment. It is a sufficient answer to this part of the case, to say, that the deed could not be impeached in this suit, and that there is no cross bill to impeach it.

The questions, therefore, in the suit lie between the

Plaintiffs and the mortgagees; on whose behalf it is insisted—first, that the deed of October, 1845, was wholly voluntary, and is absolutely defeated by their mortgages; and that the bill, therefore, ought to be dismissed as against them;—secondly, that, if the deed was not wholly voluntary, it was at all events voluntary as to all the parties except the Plaintiff *James Heap*, and therefore is defeated by the mortgages, except as to the shares limited to him;—and thirdly, that in any event the Court will not take the deeds out of the hands of the mortgagees.

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 Judgment.

As to the first point, whether the deed was wholly voluntary and absolutely void against the mortgagees, it has been contended, on the part of the Plaintiffs, that the facts of the case bring it within the authorities as to family arrangements, and as to agreements between parties touching their expectant interests; and cases on both these heads were referred to. But on the other hand it has been insisted on the part of the mortgagees, on whose behalf little or no reliance was (as I think very properly) placed in the argument on the evidence of *Dinah Heap*, that the agreement of March, 1845, was not binding on *Betty Clough*, and that the deed of October, 1845, does not follow and is not consistent with the agreement; that it rests on different recitals, and makes a different disposition of the property; and that it ought therefore to be considered as an independent instrument, for which no consideration is alleged or proved.

There being no direct evidence upon the question, whether the deed was in truth framed to carry out the original agreement, the Court must, I think, in order to determine the question, look at the position in which the parties stood when the deed was entered into, and at the contents of the deed itself. With respect to the position of the parties, there can be no doubt that the agreement

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—  
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was not binding upon *Betty Clough* the wife; but though not, as I conceive, enforceable in equity, it was I think binding upon *James Clough* the husband, and *Betty Clough* the wife had full power to adopt it, and so far as her husband and children were concerned had a very material interest in doing so, if she supposed—as it is proved by the evidence that she did—that there was a will in favour of *James Heap*. It is not proved or even alleged, that the agreement was ever abandoned, nor does it appear that there was any change of circumstances between the dates of the agreement and of the deed, which was likely to have induced a change of intention, except indeed the longer interval which had elapsed without any will having been found. The agreement, therefore, must have been considered by the parties to have been in force when the deed was entered into. Then what are the recitals of the deed? Not that it had been ascertained that *William Heap* had died intestate, but that it was believed that he had—not that *James Heap*, who could have no interest in the property except under some will of *William Heap*, had in fact no such interest; but that questions and differences had arisen, or might arise, between him and *James Clough* and his wife, touching the estate of *William Heap*, and their respective interests, rights, and titles therein and thereto; and that, for the purpose of making an amicable settlement of the respective claims of the parties, they had lately agreed to convey and assign their respective interests in the real and personal estate of *William Heap* to the trustees, upon the trusts thereafter declared; and then *James Clough* and his wife, and *James Heap*, according to their several and respective shares, estates, interests, rights, and titles whatsoever, and howsoever acquired or derived, whether by will or otherwise, of, in, and to the real and personal property of *William Heap*, convey and assign the same to the trustees. Now these recitals and this conveyance, so far

from leading to the conclusion that the agreement of March was abandoned, and a new one substituted, lead I think to the directly opposite conclusion; for both the agreement and the deed proceed upon the same footing, rest upon the same uncertainty, and are entered into for the same purpose.

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 Judgment.

It is then said, that the property is, by the deed, divided into different shares from those specified in the agreement, and that several of the shares are limited by the deed in a manner different from that prescribed by the agreement; and this is certainly the case: but the terms of the agreement were, that proper legal documents should be prepared for carrying out its purport; and *James Heap* and *James Clough* and his wife were the contracting parties, and had power to modify the interests of the other parties, whose rights depended wholly upon their contract; and the only difference between the deed and the agreement, as respects the shares, being, that *William Heap* the son of *James*, and for whom he must be considered to have stipulated by the agreement, took one-sixth under that instrument, and takes nothing under the deed,—*James* himself taking two-sixths,—and that the shares of the other parties, instead of being limited to them absolutely, are put into settlement. I think it would be very unreasonable to suppose, that the parties, on entering into this deed, were proceeding upon a new arrangement, or doing anything more than modifying the original agreement, which they had a full power to do; and I am of opinion, therefore, that the Plaintiffs have proved the case as alleged by the bill; and that the deed of the 27th of October, 1845, is not wholly void as against the mortgagees.

Power of the parties to a family arrangement, stipulating for the interests of other members of the family, afterwards to modify the terms of the arrangement.

It was then, however, insisted on the part of the mortgagees, that if the deed was not wholly voluntary and void

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—  
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The cases in which collaterals are not within the consideration of a marriage settlement, proceed upon the ground that the wife cannot be considered to stipulate on the part of the relations of the husband; but limitations in favour of collaterals are supported, if there be any party to the settlement who purchases on their behalf.

against them, it was, at all events, voluntary and void against them except as to the shares of *James Heap*; and the cases of limitations to collaterals in marriage settlements were referred to in support of this position; but those cases proceed upon the ground, that the wife cannot be considered to stipulate on the part of the relations of the husband, and there is no one, therefore, who purchases anything for the benefit of those relations. If there be any person purchasing on behalf of the collaterals, the limitations are supported; as in *Pulvertoft v. Pulvertoft* (a), where Lord *Eldon*, speaking of the case of persons not within the consideration directly, but who he says have been always so considered, preventing the effect of the statutes, puts this example:—"In the case, for instance, of a father, tenant for life, with remainder to his son in tail, they may agree, upon the marriage of the son, to settle, not only upon his issue, but upon the brothers and uncles of that son; and the question would be, whether they, though not within the consideration of the marriage, are not within the contract between the father and son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, 'I will not agree unless you will so settle.' The Court has held such a claim not to be that of a mere volunteer, but as falling within the range of the consideration, and therefore those statutes would not bear upon it." There the father and the eldest son each becomes purchaser of the other's estate for the benefit of the younger son; and so in the present case, *James Heap* and *Betty Clough* respectively purchase each other's interests, for the benefit of the other objects of the deed. In my opinion, therefore, the cases referred to do not apply, and the deed is valid against the mortgagees, not only as to the shares of *James Heap*, but as to the shares of the other parties also.

(a) 18 Ves. 92.

The remaining question raised on the part of the mortgagees was this:—that the Court would not take the title deeds out of their hands. This question does not appear to me to be raised by the bill, and I therefore give no opinion upon it. There is no prayer for the delivery up of the title deeds; and the allegations of the bill respecting them appear to me to be directed against the Defendants *James Clough* and *John Tonge*, and not against the mortgagees, who have a clear interest in the deeds in respect of the interests in the estate, which are well vested in them. I can give no directions therefore as to the deeds. But there is an abundant case proved to remove the Defendant *John Tonge* from the trusts; and the Defendant *John Mills* desiring to be discharged, new trustees must be appointed; and it will be for the new trustees to deal with the question as to the deeds, if it becomes necessary for them to do so.

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 —  
*Judgment.*

[His Honor dictated the minute of the decree, as below.]

The costs only remain to be considered: and I think neither the mortgagees nor any of the parties claiming under the settlement of June, 1848, nor the Defendant *Greenhalgh*, the trustee of that settlement, are entitled to any costs. It was the fault of the Defendant *Greenhalgh* to have allowed his name to be used as trustee. As to the other parties, I think the Plaintiffs must pay the costs of the Defendants, *Mills*, *Houghton*, and *Boardman*, and have them over with their own costs against the Defendants *James Clough* and *John Tonge*; but I think *Dinah Heap's* costs must be reserved.

A party becoming trustee under a deed creating interests adverse to interests already existing, may be liable to costs in a suit instituted to enforce such pre-existing interests in the trust property (a).

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DECLARE the indenture of the 27th of October, 1845, and the estates and interests thereby created in the property therein comprised, valid

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*Minute.*

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(a) See *Elsey v. Lutyens*, 8 Hare, 159, 165.

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TONGE.

Minute.

and effectual against the Defendants *James Clough* and *Betty* his wife, and the several Defendants claiming under any act done by them, or either of them, since the execution of the said indenture; but this declaration is not to prejudice or affect any right or interest of any of the said Defendants, upon or against the estate and interest by the said indenture limited to the said Defendants, *James Clough* and *Betty* his wife, or either of them. Direct the trusts of the deed to be carried into execution. Direct the accounts as prayed against the Defendants *John Tonge*, *John Mills*, and *James Clough*, except as to wilful default. Remove the Defendant *John Tonge* from the trusts of the indenture; and the Defendant *Mills* desiring to be discharged from such trusts, refer it to the Master to appoint two new trustees in the place of *Tonge* and *Mills*; and direct a conveyance and assignment to the new trustees. Appoint a receiver. (Costs as above). Reserve further directions and subsequent costs.

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May 2nd.

IN THE MATTER OF WATTS'S SETTLEMENT, AND OF THE TRUSTEE ACT, 1850, AND THE STAT. 1 WILL. 4, c. 60.

A power to appoint a new trustee in the place of a trustee who should become incapable to act, contemplates the personal incapacity of such trustee; and therefore a trustee who had become bankrupt, and been indicted for not surrendering to the fiat, and had absconded, was held not thereby to have become "incapable" of acting in the trust, within the meaning of the power.

THE settlement in this case enabled certain of the parties beneficially interested in the settled property, to appoint one or more trustee or trustees in the place of any trustee or trustees who should die, or be desirous of being discharged from, or refuse, or decline, or become incapable of acting in the trusts. A reference was directed to the Master on a petition in June, 1848, under the statute 1 Will. 4, c. 60, to inquire whether *Bentall*, one of three trustees of the settled property, was a trustee within the Act, and if so, to approve of a new trustee in his stead. The Master, by his report dated in February, 1851, certified that *Bentall* had become bankrupt, but had never surrendered under the fiat; that he had been outlawed and indicted for not surrendering; and that he had abscond-

Where there are several trustees, one of whom is out of the jurisdiction, and a new trustee is appointed by the Court in his place under the Trustee Act, 1850, an order vesting the trust estate in the new and continuing trustees will, under the 10th section of that Act, have the effect of severing the joint-tenancy—*Semble*.



ed, and was then living out of the jurisdiction; and the Master certified, that under such circumstances there was no power given by the settlement to appoint a trustee in the place of *Bentall*; and that he had therefore approved of a proper person to be a trustee in his place. The present petition to confirm the report was intituled in the matter both of the old and the new Act (Trustee Act, 1850 (a),) praying the appointment of the new trustee approved by the Master in the place of *Bentall*; and that a person approved of by the Master might be directed to convey the estate vested in *Bentall* to the continuing trustees and the new trustee; or that the Court would make an order vesting the trust estate in such continuing trustees and new trustee under the Trustee Act, 1850.

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 In re  
 WATTS'S  
 SETTLEMENT,  
 TRUSTEE ACT,  
 1850, AND  
 1 WILL. 4, c. 60.  
 Statement.

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Mr. *Shapter* for the Petitioner.

Argument.

Mr. *Rolt* and Mr. *Thring* for the other parties interested under the settlement submitted, that the situation of *Bentall*, as outlawed, subject to criminal proceedings, and out of the jurisdiction, was tantamount to incapacity within the meaning of the settlement; and that therefore the power of appointment arose under the instrument: *Wilson v. Wilson* (b), *In re Roche* (c).

Mr. *Shapter* submitted, that the situation of *Bentall* did not render him "incapable;" he might return within the jurisdiction, and remove the outlawry; or he might act in the trusts by attorney: *Withington v. Withington* (d).

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(a) 13 & 14 Vict. c. 60.

(b) 6 Scott, 540.

(c) 2 Dr. & War. 287.

(d) 16 Sim. 104.

1851.

*In re*  
WATTS'S  
SETTLEMENT,  
TRUSTEE ACT,  
1850, AND  
1 WILL. 4, c. 60.

—  
*Judgment.*

VICE-CHANCELLOR:—

It appears to me that the disqualification which is referred to in the settlement under which the trustee becomes incapable of acting, has reference to personal incapacity; and that the absence of *Bentall*, and his situation with regard to his bankruptcy, does not constitute such an incapacity as is there provided for. In the case of *Wilson v. Wilson*, the question was as to the capacity of the party for the office of committee-man; and *In re Roche*, the question was as to fitness of the party, without reference to his legal capacity. The case therefore has not arisen in which a new trustee in lieu of *Bentall* could be appointed under the power in the settlement; and the Master's report must be confirmed.

With regard to the order which should be made, I observe that the petition prays that the trust estate may be vested, by the order of the Court, in the new trustee and the continuing trustees. I think that under the words of the new Trustee Act (a) there is difficulty in applying that form of order to the case of several trustees, where one of the trustees is out of the jurisdiction, and another is to continue in the trust. By the 10th section it is enacted, that the order of the Court for vesting the estate shall have the same effect as if the trustee out of the jurisdiction had duly executed a conveyance or assignment of the trust property. But where such person is not a sole trustee, but one of several trustees, such a conveyance by him alone would have the effect of severing the joint tenancy. There is another section of the Act (sect. 34) in which the language is somewhat different; but it does not appear to me to be a proper construction of the Act, to read the latter as contradictory of the earlier clause. The 34th section enacts, that, upon appointing a new trustee

(a) 13 & 14 Vict. c. 60.

or new trustees, it shall be lawful for the Court to direct "that any lands subject to the trust shall vest in the person or persons, who, upon the appointment, shall be the trustee or trustees for such estate as the Court shall direct; and such order shall have the same effect as if the person or persons who, before such order, were the trustee or trustees (if any), had duly executed all proper conveyances and assignments of such lands for such estate." I do not see that this clause, of necessity, destroys the effect of the distinct enactment contained in the 10th section. Where there is a sole trustee, the order will be adapted to the case.

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*In re*  
**WATTS'S**  
**SETTLEMENT,**  
**TRUSTEE ACT,**  
**1850, AND**  
**1 WILL. 4, c. 60.**  
*Judgment.*

The better course will be, not to make a vesting order, but to order the party appointed to convey for *Bentall* to join with the two continuing trustees in conveying the trust premises to the three,—the two continuing trustees and the new trustee approved of by the Master.

## FREEMAN v. LOMAS.

*May 8th &  
 July 5th.*

**T**HOMAS LOMAS the elder, by his will, dated in 1815, bequeathed 1000*l.* to his daughter *Mary* the wife of *George Wood* for life, and after her decease, to her children, who should attain twenty-one, and appointed the defendant *Thomas Lomas*, and *Richard Bentley*, his executors. He died in 1817; and in 1818, *Lomas* and *Bentley* proved his will. *Martha Lomas Wood*, who was the only child of the testator's daughter *Mary Wood*, attained twenty-one, and in 1840 intermarried with *James Napier*. *Bentley*, the co-executor of the Defendant *Lomas*, died some time before the 15th of April, 1842; and on that day, 500*l.*, part of the

Cross demands, existing in separate rights, are not, in equity, (except under special circumstances) allowed to be set off one against the other; and therefore an executor and trustee of a legacy, who was also the residuary legatee, and had become a creditor of the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set-off his debt against the legacy to which the husband (having survived his wife the legatee,) was, as such administrator, entitled.

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 LOMAS.  
 —  
*Statement.*

1000*l.*, was paid on a joint receipt given by *Mary Wood*, *Martha Lomas Napier*, and her husband *James Napier*, to the Defendant *Thomas Lomas*, as sole executor, and also as residuary legatee of the testator. In June, 1843, *Martha Lomas Napier* died; and in December, 1843, *James Napier* obtained letters of administration of her estate. Between this period and December, 1847, the Defendant *Thomas Lomas* became surety for *James Napier* to various persons for various sums of money, for one of which sums he took a warrant of attorney from *Napier* by way of security against his liability. In December, 1847, a fiat in bankruptcy issued against *James Napier*, under which the Plaintiffs became assignees. *James Napier* did not surrender to this fiat; and after the fiat was issued, the Defendant *Thomas Lomas* was called upon to pay, and paid, on account of his suretyship, monies to an amount exceeding what remained unpaid in respect of the legacy.

*Mary Wood*, the tenant for life of the legacy, died in January, 1848, and the bill was filed by the assignees of *Napier* to recover the unpaid part of the legacy of 1000*l.*, with interest from the death of *Mary Wood*. The Defendant *Thomas Lomas*, by his answer, admitted assets, but claimed to retain the amount on account of the payments made by him in respect of his suretyship.

*Argument.*  
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The *Solicitor-General* and Mr. *Torriano* for the Plaintiffs.

The sums which constitute the cross demands in this case, are owing in different rights, and cannot be made the subject of set-off: *Bishop v. Church* (a), *Whitaker v. Rush* (b), *Medlicot v. Bowes* (c), *Gale v. Luttrell* (d). Nor is it a case

(a) 3 Atk. 691.

(b) Amb. 407.

(c) 1 Ves. 207.

(d) 1 Y. & J. 180.

for retainer of the legacy by the creditor and executor: *Cherry v. Boulbee* (a); for, as expressed in that case, in order that such a right should arise, there must be "a time at which the same person was entitled to receive the legacy, and liable to pay the debt." In this case, the tenant for life died after the bankruptcy; and the fund, therefore, could never have come to the hands of the bankrupt, whilst all the payments upon which the debt claimed by the defendant arises, have been made by the defendant since the bankruptcy.

1851.  
 FREEMAN  
 v.  
 LOMAS.  
 Argument.

Mr. Bethell and Mr. Glasse for the Defendant.

It is true, that the formal rights, in which the cross demands are made, are different, but the beneficial interest is the same; and equity will look to the substantial interest, and not to the formal trust. The Defendant is both executor and residuary legatee: he is therefore dealing with a fund which is his own, and not with a fund which he holds in trust for any other party. The debtor, who has become bankrupt, is also not only the administrator of the estate of his deceased wife, and, in that character, the party legally entitled to receive her legacy, but as the husband, surviving his wife, he is the party beneficially interested in the fund, when he receives it. The assignees stand precisely in the place of the bankrupt, and represent his rights, and, to the extent of the estate, his liabilities. It is, therefore, merely relying on technicalities, to say, that in this case it is not on either side the same person who is entitled to receive and liable to pay. In such a case, there are several authorities which affirm the principle, not perhaps strictly of set-off, but that a trustee or party who has money of another in his hands, may retain it for a debt which such other person owes to himself. The Court pre-

(a) 4 My. & Cr. 442.

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*Argument.*

sumes an agreement to have been made between the parties for setting one demand against the other. [VICE-CHANCELLOR.—Do you say that this is a necessary presumption, or that circumstances must be shewn to raise it?] It has been regarded as almost a necessary presumption. Circumstances have indeed been sometimes adverted to, but they have been of the slightest kind. It is, in fact, a necessary result of the principle, that a party who would have equity must do equity; that a party sued in equity by his debtor, may retain what is owing to him by the latter: *Jeffs v. Wood* (a), *Clark v. Cort* (b), *Courtenay v. Williams* (c).

*Judgment.*

VICE-CHANCELLOR (after stating the facts):—

The question to be determined is, whether the Defendant *Lomas* has the right upon which he insists,—to retain the unpaid portion of the legacy.

Questions as to the rights of debtors and creditors, in cases of cross demands between them, appear to have arisen and been determined in equity before the right of set-off was introduced into the statute law of this country, as will be found on referring to *Curson v. African Company* (d), and *Peters v. Soame* (e), both of which cases were anterior to the statute 4 Anne, c. 17, by which the first statutory provision for set-off in bankruptcy was introduced; and there are other cases in equity not falling within the provisions of the statute of Anne, between the date of that statute and the statute 2 Geo. 2, c. 22, by which the right of set-off at law was given: *Downam v. Matthews* (f), *Jeffs v. Wood* (g). It is clear, therefore, that the rights of

(a) 2 P. Wms. 128.

(b) Cr. &amp; Ph. 154.

(c) 3 Hare, 539.

(d) 1 Vern. 121.

(e) 2 Vern. 428.

(f) Prec. Chan. 580.

(g) 2 P. Wms. 128.

debtors and creditors, in cases of cross demands between them, as those rights subsisted in equity, were not derived from or dependent upon any statutory right of set-off; and on the other hand, it seems not to be improbable that the statutory rights were founded on the equitable rule.

1851.  
FREEMAN  
v.  
LOWAS.  
Judgment.

It is important, therefore, to the determination of the present question, to consider what was the foundation of the equitable rule. Sir *Thomas Clarke*, in *Whitaker v. Rush* (a), though the report (erroneously as I conceive) ascribes to him the opinion that the rule was first introduced into our law by statute, refers the rule itself to the Roman law, and in this I have no doubt he was correct. By that law, Dig. lib. XVI. tit. II. De Compensationibus, it is said, (sect. 3), "Ideo necessaria est compensatio, quia interest nostra potius non solvere, quam solutum repetere;" and in the comment on the word "necessaria," it is said, "Id est, cum lis possit uno judicio definiri, scilicet per actionem et exceptionem, pluralitas seu multitudo judiciorum non debet admitti, ut quæ incommoda sumptusque adferat; quinetiam compensationem æquitas poscere videtur, nam dolo facit qui petit quod restitutus est" (b). And in section 6, it is said, "Etiam quod natura debetur venit in compensationem." But, although the Roman law was thus liberal in allowing compensation, it would seem that it did not allow it where the cross demands were not in the same right, for in section 23, under the same title, it is said, "Id, quod pupillorum nomine debetur, si tutor petat, non posse compensationem objici ejus pecuniæ, quam ipse tutor suo nomine adversario debet."

The equitable right of set-off is not derived from or dependent upon any statutory right, but is founded on the Roman law — *semble*.

The rule then being thus deduced from the Roman law, it is to be seen how it has been dealt with by our Courts; and I believe, that, upon examining the authorities, it will

(a) Amb. 407.

thofredi, 1615, n. (k): voc. *Necessaria*, tit. ut supra.

(b) Cor. Jur. Civ. Dion. Go-

thofredi, 1615, n. (k): voc. *Necessaria*, tit. ut supra.

1851.

FARMER  
v.  
LOMAS.

*Judgment.*

The Court has, on slight circumstances, presumed the existence of an agreement to set off one against another cross demand, although existing in different rights; but such an agreement will not be presumed without some circumstances from which it might be inferred,  
—*Semle.*

be found, that, except under special circumstances, Courts of Equity have never allowed cross demands existing in different rights to be set the one against the other. The cases on this point, cited on the part of the Plaintiffs, to which may be added *Chapman v. Derby* (a), are distinct authorities against the right, in an ordinary case, to apply one of such demands in satisfaction of the other; but it is not to be denied, on the other hand, that agreement, express or implied, may confer such a right, and that slight circumstances may be sufficient to warrant the Court in presuming such an agreement. Thus, the right was admitted in *Downam v. Matthews* (b), upon the course of dealing; in *Jeffs v. Wood* (c), upon the fact of the legatee having omitted to credit the executor with the goods supplied; and in *Jones v. Mossop* (d), upon the ground of the objection as to the demands being in different rights having been removed by the answer.

This being the position of the general question as it stands upon the authorities, it is hardly necessary to consider the reasons on which the rule of the Court is founded. It is sufficient to refer to the judgment in *Jones v. Mossop* (e), as explaining the principle of the rule; and to the judgment in *Bishop v. Church* (f), as pointing out the inconveniences to which a contrary rule would lead. It may be said, that in the present case the admission of assets removes many of those inconveniences; but surely the right cannot depend upon the amount of the assets. If the right exists where the assets are fully sufficient, must it not exist to the extent to which they are sufficient? The inconvenience, too, of mixing the demands is hardly less whether the assets be sufficient or not; for if the account should afterwards be taken with the residuary

(a) 2 Vern. 117.

(b) *Ubi supra.*

(c) *Ubi supra.*

(d) 3 Hare, 568.

(e) *Ubi supra.*

(f) 3 Atk. 691.



legatee, the Court would be driven to the ascertainment of the debt due to the executor from the legatee; and although, in this particular case, the executor may be himself the residuary legatee, I cannot see how the right can be made to depend upon that fact. The same state of circumstances existed in *Medlicot v. Bowes*(a), where *Jane Bowes* was (as I have ascertained from the Registrar's Book) the executrix and residuary legatee of *Dr. Bowes*; but the Court, nevertheless, refused the set-off, and acted upon the broad general rule, that there was no right of set-off at law, and no right in equity before the introduction of set-off at law.

1851.  
FREEMAN  
v.  
LOWAR.  
Judgment.

It remains to be considered, then, whether there is any special circumstance, or any ground for presuming an agreement, which would justify the Court in allowing the set-off in the present case; and I am of opinion that there is not. I think that, on the contrary, the fact of the Defendant having taken the warrant of attorney leads to the presumption that no such agreement was made. I am of opinion, therefore, that the Plaintiffs are entitled to the decree which they ask; and, looking at the case as a contest upon a point of law on which the Plaintiffs have succeeded, I must give them their costs.

I have not noticed the other cases referred to in the argument, as I do not think that they have any application to the present question. In none of them were the demands *en auter droit*; for where the question arises with assignees in bankruptcy, the assignees, according to the anonymous case in 1 *Modern Rep.*(b), and the authorities cited in the note, are considered as the bankrupt—a circumstance which has always created a difficulty in my

(a) 1 Ves. 207.

(b) Page 215.

1851.

FREEMAN  
v.  
LOMAR.

*Judgment.*

Where one demand is equitable and the other legal, there may be set-off in equity, if there would be set-off at law had both the demands been legal.

mind as to the decision in *Cherry v. Boulbee*(a), although; had it been necessary to consider that case, I should of course have felt myself bound to follow it. The other cases which were cited in argument merely establish the principle, that where one demand is equitable and the other legal, there is set-off in equity, if there would be set-off at law had both the demands been legal.

(a) 4 My. & Cr. 442.

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May 13th. IN THE MATTER OF MEYRICK'S ESTATE, AND OF THE TRUSTEE ACT, 1850.

The 19th section of the Trustee Act, 1850, does not enable the Court, on the petition of the administrator of a mortgagee in fee, who has died intestate, and whose heir is unknown, to vest the mortgaged estate in such administrator, subject to the equity of redemption,—the mortgage-debt remaining unpaid.

*Argument.*

A MORTGAGEE in fee having died intestate, and it not being known who was her heir-at-law, the petition was presented by her administrator, stating, that neither the mortgagee, nor any person claiming under her, had ever been in possession or receipt of the rents and profits of the mortgaged premises, and that the legal estate was vested in such unknown heir, and praying the order of the Court for vesting the premises, subject to the equity of redemption, in the petitioner in fee, under the 19th section of the Trustee Act, 1850 (a), the petitioner being the person entitled to receive the money due on the mortgage.

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Mr. *H. Stevens* for the petition submitted, that the circumstances brought the case within the last class described in the 19th section of the Trustee Act, 1850, viz. "when such mortgagee shall have died intestate as to such lands and without an heir, or shall have died and it shall not be

(a) 13 & 14 Vict. c. 60.

known who is his heir or devisee." The petitioner was clearly the person entitled to receive the mortgage money, and to deal with the estate as the representative of the mortgagee.

1851.

*In re*  
MEYRICK'S  
ESTATE,  
AND TRUSTEE  
ACT.

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VICE-CHANCELLOR:

I am of opinion that this case does not fall within the provisions of the statute. The 19th section not only requires, that, in order to give the Court jurisdiction, the case shall be one in which the mortgagee has not been in possession or in receipt of the rents and profits of the mortgaged property; but it also requires, either that the money due in respect of the mortgage shall have been paid to a person entitled to receive the same, or that such person shall consent to a reconveyance of the mortgaged estate. In this case, the mortgage-debt has not been paid, and a reconveyance to the mortgagor is not sought. So long as the mortgage money remains unpaid, there may be equities subsisting between the heir and the personal representatives of the mortgagee. The introduction of the condition as to the payment of the money in the power given to the Court, would rather seem to indicate the intention of the legislature, that the Court shall not deal with such equities.

*Judgment.*  
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The case of a mortgage is, throughout the Act, carefully distinguished from a case of trust; and it does not appear to me that this case is within any of the provisions of the Act.

1851.

June 16th & 17th. IN THE MATTER OF HODSON'S SETTLEMENT, AND OF THE TRUSTEE ACT, 1850.

The Court has not jurisdiction under the Trustee Act, 1850, to take away the power of appointing new trustees from the donees of the power, where the donee is capable of exercising, and willing to exercise, the power, although such donee may have disclosed an intention or desire to exercise his power corruptly.

A PETITION for the appointment of two new trustees of real estate in the place of *Lee*, a deceased, and *Lister*, a surviving trustee. The trusts were created by a settlement, under which the property was vested in *Lee* and *Lister*, upon trust for *E. Hodson* for life, with remainder to *Mary* his wife for her life, with remainder to the children of the marriage; and if there should be no such children, upon trust for sale, and to stand possessed of the proceeds of such sale upon certain other trusts for the benefit of the petitioners. The settlement provided, that if *Lee* and *Lister*, or either of them, or any surviving trustee to be nominated in their or either of their stead in manner thereafter mentioned, should happen to die, or desire to be discharged from the said trusts, or refuse or be rendered incapable to act in the execution of the same, it should be lawful for the said *E. Hodson* and *Mary* his wife, and the survivor of them, and after the death of such survivor for the remaining or other trustee, by deed attested as therein mentioned, to nominate and appoint new trustees or a new trustee, in the place of the trustees or trustee so dying, or desiring to be discharged, or becoming incapable to act. *Mary Hodson* the wife had long since died, and there was no child of the marriage. *Lee*, one of the trustees, was also dead, and *Lister* was in very advanced years, being, as it was stated, nearly of the age of eighty.

The petition stated, that *Lister*, the surviving trustee, had intimated his wish to retire from the trust; and that *Hodson* the husband, in whom the power of appointing new trustees was vested by the settlement, had refused to exercise such power, unless upon receiving a consideration

for doing so. The petition also stated, that *Hodson* had parted with the whole of his interest in the trust property.

The affidavits on behalf of the petitioners and the respondents were conflicting as to some points, having reference to the conduct of the parties. *Hodson*, however, stated, that he was willing and desirous of exercising his power to appoint a new trustee in the place of *Lee*; and the surviving trustee *Lister* stated, that he had not consented, and did not desire, to be discharged from the trust.

1851.  
 In re  
 HODSON'S  
 SETTLEMENT,  
 AND TRUSTEE  
 ACT.  
 Statement.

Mr. *Malins* and Mr. *Bilton* in support of the petition, relied on the 32nd section of the Trustee Act, 1850, which enabled the Court to appoint new trustees, wherever it should be "expedient" to do so, and it should be found "inexpedient, difficult, or impracticable" to make the appointment without the assistance of the Court. In this case the "expediency" and even necessity of making the appointment was clear, one trustee of great age only remaining; and the "inexpediency and impracticability" of making the appointment in any other manner had been also shewn by the fact, that the donee of the power had been attempting to deal corruptly, by bargaining for a price for the execution of his power. It was not enough for him now to say, that he was willing to exercise the power without remuneration.

Argument.

Mr. *Shebbeare*, for an incumbrancer, supported the petition.

Mr. *Cooper* and Mr. *Swift*, for *Hodson*, contra.

1851.

*In re*  
HODSON'S  
SETTLEMENT,  
AND TRUSTEE  
ACT.

*Judgment.*

VICE-CHANCELLOR:—

The first difficulty in this case arises upon the power vested in the respondent *Hodson*; for if the power remains in and can be exercised by him, unless I can find, that, under the provisions of the statute, I am enabled to prevent him from exercising the power, I cannot, upon this petition, appoint a trustee in the place either of *Lee*, the deceased, or of *Lister*, the surviving trustee. I cannot of course appoint a trustee in the place of *Lister*, unless I first remove him; and if I should remove him, I cannot appoint another in his place, unless the provisions of the statute enable me to take away from *Hodson* the power of appointment given him by the settlement.

Now, the 32nd clause of the statute enacts, that, “when- ever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or im- practicable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees.” The question is, whether that provision autho- rises the Court to appoint a new trustee where a power to appoint one is vested in a party who is capable of exercis- ing it, and willing to do so. I am of opinion that it does not; looking at other provisions of the Act, I see that the legislature, in enabling the Court to deal with the legal estate, is careful to introduce proper precautions to pre- vent an unnecessary interference with any existing right. Thus, by the 17th section of the Act, power is given to the Court to convey the trust estate in the place of a refusing trustee; but this power does not arise until there is either a declaration in writing of the party or his agent, that he will not convey or assign the property, after a proper de- mand made, or until twenty-eight days shall have elapsed after a proper deed for conveying or assigning the same

shall have been duly tendered to him by a party entitled to require the execution of such deed. So, in another provision of the statute, relating to the transfer of stock or choses in action (sect. 24), it is provided, that, where any one of the trustees shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court to make the vesting order as therein stated.

1851.  
*In re*  
**HODSON'S**  
**SETTLEMENT,**  
**AND TRUSTEE**  
**ACT.**  
*Judgment.*

It is clear, from the introduction of these provisions, that it was not the intention of the legislature to take estates out of trustees without the observance of every necessary and proper precaution; and I think it is a reasonable inference, that it was not intended to take away a legal power vested in a party without a similar degree of precaution being observed. I am of opinion, that it is not competent to the Court, under the provisions of this statute, to take away the legal power vested in *Hodson*, however corruptly he may have intended to exercise it. That in effect disposes of the case; for if I have not power to appoint a trustee in the place of *Lee*, I clearly cannot have power to appoint one in the place of *Lister*, if I remove him.

Independently, however, of the power which remains in *Hodson*, I think that this statute was not intended to give the Court jurisdiction to remove a trustee, where he states that he is desirous of continuing in the trust. The Act empowers the Court, whenever it is expedient, to appoint new trustees; but that provision is, I think, confined to the appointment, and does not extend to the discharge of a trustee who is willing to remain.

1851.  
*In re*  
**HODSON'S**  
**SETTLEMENT,**  
**AND TRUSTEE**  
**ACT.**  
*Judgment.*

The petition must be dismissed, but without costs, for I cannot say that it was improperly presented. If *Hodson* had persevered in his refusal to exercise the power, and *Lister* had still desired to retire from the trust, the Court might have found the means of dealing with the case under the provisions of the statute.

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*June 14th.*

ROBINS *v.* HOBBS.

The 8th section of the stat. 7 & 8 Vict. c. 70, "for facilitating arrangements between debtors and creditors," which enacts, that upon the filing of the resolution and agreement therein mentioned, all the estate and effects of the petitioning debtor shall vest in the trustee (if any be appointed) as fully as if such trustee were an assignee in bankruptcy,—has not necessarily the effect of vesting in the trustee all the estate and effects of the petitioning debtor, but vests only so much of such estate and effects as the debtor may give up and the creditors accept, or that part of the estate and effects in respect of which the trustee is appointed.

**T**HE Plaintiff and Defendant were partners as attornies and solicitors from May, 1838, to May, 1845, and the claim was filed to have the partnership accounts taken.

It appeared by the affidavits that the Plaintiff had applied for and obtained the benefit of the statute of the 7 & 8 Vict. c. 70, for facilitating arrangements between debtors and creditors. The 8th section of this statute provides, that, from and after the filing of the resolution of the creditors and the agreement therein mentioned, all the estate and effects of the petitioning debtor shall, by virtue of such resolution, and without any deed, vest in the trustee (if any be appointed), as fully as if such trustee were an assignee under the statutes relating to bankrupts; and such trustee may sue and be sued as if he were such assignee in bankruptcy. The question was, whether, by the effect of this statute, the interest of the Plaintiff in the subject of the claim had not vested in a trustee named by the creditors, so as to preclude the Plaintiff from sustaining the suit.

The second meeting of creditors convened under the 4th section of the Act may accept or reject, but cannot vary, the terms of the agreement assented to by the first meeting—*Semble.*



Mr. *Shoe*, for the Plaintiff, in answer to the objection, contended, first, that no trustee had been appointed, and therefore that there was no party in whom the estate of the Plaintiff could vest; and secondly, if there had been an effectual appointment of a trustee, the interest of the Plaintiff in the subject of the suit had not vested in him.

1851.  
 ROBIN  
 v.  
 HONAN.  
 —  
*Argument.*

In support of the argument, that no trustee had been appointed, the following facts, appearing on the affidavits, were relied upon:—The petition of the Plaintiff under the Act was presented in November, 1849, proposing to set aside one-sixth part of his professional income for the ensuing ten years, for the satisfaction of his debts. At a meeting of the creditors of the Plaintiff, held according to the Act (sect. 2), a resolution was passed, assenting to the proposal, that he should lay aside one-sixth of the profits of his practice as attorney and solicitor for ten years, the Plaintiff undertaking to render, on oath, an account of his said annual profits, and to distribute the same rateably amongst his creditors: and it was also resolved, that a trustee should be appointed; and one *Willmot* was chosen as such trustee. *Willmot* subsequently declined to act. A second meeting of creditors, in pursuance of the 4th section of the Act, was holden in September, 1850; and a resolution was then passed, agreeing to and accepting the terms of the arrangement assented to at the first meeting, but without adverting to that part of the resolution past at the first meeting by which *Willmot* was appointed trustee, and without appointing any other person as trustee in the place of *Willmot*. The resolutions and agreement thus passed and confirmed were afterwards submitted to the Commissioner, under the Act, who approved the same, and caused them to be filed in the Court of Bankruptcy, and gave the Plaintiff the certificate and protection, according to the provisions of the Act. The 5th section of the Act rendered the assent of the creditors at the second

1851.

Ровинс  
v.  
Новис.

Argument.

meeting necessary, in order that the arrangement adopted by the first meeting should be binding; and inasmuch as the appointment of a trustee was a part of the first arrangement, not adopted or confirmed at the second meeting, it was contended that no trustee had in fact been appointed, and that the case did not therefore come within the operation of the 8th section of the Act.

Supposing, however, that the adoption of the arrangement must be deemed to carry with it the confirmation of the appointment of the trustee, without any express recognition of that part of the resolution, then it was contended, that the effect of the 8th section, in the circumstances of the case, was to vest in the trustee not the whole estate and effects of the plaintiff, but only so much as he had agreed to give up to his creditors, and the creditors had agreed to accept.

Mr. *Southgate*, for the Defendant.

There is no doubt that the arrangement in this case involves the appointment of a trustee; that was a distinct and material part of the resolutions of the first meeting. It was competent to the second meeting to accept or reject the arrangement agreed to by the first; but it was not competent to the second meeting to vary that arrangement. The Commissioner had confirmed the arrangement, and granted the protection; and that confirmation must extend to the whole and not to part only of the arrangement. The trustee being thus appointed, the whole estate and effects of the petitioning debtor would necessarily, by force of the 8th section of the statute, vest in the trustee. It was not possible to limit the effect of the statute to a part of the estate only; for the vesting of the estate was expressly made to operate in the same way as upon bankruptcy the estate of the bankrupt vests in his assignee.

It was not possible to construe this as a partial or less than a total alienation of the debtor's estate.

1851.

ROBINS  
v.  
HOBBS.

VICE-CHANCELLOR.

I think the objection to the title of the Plaintiff, founded upon the effect of the statute, cannot be sustained.

*Judgment.*

The scheme of the Act will appear upon examining its provisions. The 1st section enables any debtor unable to meet his engagements, and not being a trader within the meaning of the bankrupt laws, with the concurrence of one third in number and value of his creditors, "to present a petition to the Court of Bankruptcy, setting forth a full account of his debts, and the consideration thereof," "and also a full account of his estate or effects, whether in possession, reversion, or expectancy, and of all debts and rights due to or claimed by him, and of all property of what kind soever held in trust for him; and also setting forth that he is unable to meet his engagements with his creditors, and the true cause of such inability; and also setting forth such proposal as he is able to make for the future payment or the compromise of such debts or engagements; and that one-third, in number and value, of his creditors have assented to such proposal; and praying that such proposal (or such modification thereof as by the majority of his creditors should be determined,) should be carried into effect, under the superintendence and control of the said Court; and that he, the petitioning debtor, should in the meantime be protected from arrest by order of the said Court." The 4th section provides, "that if at such meeting of creditors the major part in number and value, or nine-tenths in value, or nine-tenths in number whose debts exceed 20*l.*, shall assent to the proposal of such petitioning debtor, or to any modification thereof, the president of such meeting shall appoint another meeting of

1851.

ROBERT  
v.  
HOBBS.

*Judgment.*

the creditors of such petitioning debtor," to be held upon the time and on the notices therein specified. The 5th section provides, "that if at such second meeting of creditors three-fifths in number and value," "or nine-tenths in value, or nine-tenths in number whose debts exceed 20*l*., shall agree to accept such arrangement or composition as was assented to at the first meeting of creditors, and shall reduce the terms thereof into writing, and sign the same; such resolution or agreement" (subject to such confirmation as is thereafter enacted,) "shall thenceforth be binding and of full force, as well against the said petitioning debtor as against all persons who were creditors of the said petitioning debtor at the date of the said petition, and who had notice of the said several meetings of creditors; provided, however, that such resolution or agreement shall not be valid, unless one full third in number and value of all the creditors of such petitioning debtor were present at such second meeting, either in person or by an authorised agent." The 6th section provides, that "within fifteen days next after the passing of such resolution or agreement, the same shall be submitted to the Commissioner acting in the matter of the said petition, who, if he shall think the same reasonable, and proper to be executed under the direction of the said Court, shall cause the same to be filed and entered of record therein, and shall grant to such petitioning debtor a certificate of such filing, and shall from time to time indorse on such certificate his protection of such petitioning debtor from arrest," and he is thereupon to be free from arrest "at the suit of any person being his creditor at the date of his said petition," and having had such notices. And the 7th section enables the Commissioner to grant a limited or conditional freedom from arrest.

Then comes the 8th section, which has been principally relied upon in support of the objection. By this section

it is enacted, "That, from and after the date of the filing of such resolution and agreement as aforesaid, all the estate and effects of such petitioning debtor shall vest in the trustee (if any such shall be appointed) by virtue of such resolutions, and without any deed, as fully as if such trustee were an assignee under the statutes relating to bankrupts; and every such trustee may sue and be sued as if he were such assignee in bankruptcy." And the 9th section provides for the audit of the accounts of all monies, estates, and effects of such petitioning debtor, come to the hands of the said trustee.

1851.  
 Romms  
 v.  
 Romms.  
 Judgment.

Now it appears, in the present case, that the Plaintiff has taken the benefit of this Act, and that the petition presented by him for that purpose stated the amount of his debts, and also the particulars of which his estate and effects consisted. It gave a full account of his estate and effects, which appeared to consist chiefly of shares in patents. The proposal thereby made by the petitioner was to set apart one-sixth of his professional income for his creditors. A first meeting was then held, and the creditors, as I assume, adopted that proposal, with the modification that a trustee should be appointed. Now, what is the meaning of that modification? Does it not mean, in the ordinary sense, that a trustee should be appointed of that which the petitioner proposed to give up for the benefit of his creditors, and by whose means the arrangement proposed was to be carried out? The proposal so modified having been accepted, a second meeting was convened, and the proposal, which had been assented to by the first meeting, was confirmed by the second. I agree with the argument, that the creditors at the second meeting had no power to vary the proposal made at the first. Then came the confirmation of the Commissioner, which followed the resolution adopted at the second meeting.

1851.

ROBINS  
v.  
HOBBS.*Judgment.*

The matter therefore stands thus: An agreement has been made, by which the debtor is to give up one-sixth of his future income for ten years, and a trustee is to be appointed. In looking at the 8th section of the Act, I have to consider what is the meaning of the words "all the estate and effects of the petitioning debtor shall vest in a trustee (if any such be appointed)." The argument is, that the necessary effect of a trustee being appointed is to vest the whole of the petitioning debtor's property in such trustee for the benefit of his creditors: I think that would be too strong a construction of the words of the 8th section to which I have referred. The meaning appears to me to be, that all that part of the estate and effects of the petitioning debtor, which he has proposed to give up, and which the creditors have agreed to accept, shall vest in the trustee. It is not, I think, the intention of the statute to superadd to the property accepted by the creditors all the remaining property of the petitioning debtor, and to vest the whole in the trustee; and I think the appointment of a trustee under the Act has not the effect of vesting such additional property in him. That this is the true construction of the 8th section is, I think, shewn by the words in which it refers to the trustee, "if any such shall be appointed." The creditors might not think it necessary to appoint a trustee; but if they do appoint one, it may be inferred from those words, that it was intended by the 8th section that such part of the petitioning debtor's property only, of which he shall be appointed a trustee, shall be vested in the trustee. The objection cannot, therefore, be allowed.

ROBINSON v. TURNER.

1851.

July 4th.

A CLAIM for foreclosure.

Mr. *Faber*, for the Plaintiff.

At the hearing of a claim for foreclosure, option will be given to the Plaintiff to take either the common order for foreclosure, or an inquiry as to other incumbrances, suspending the order for foreclosure until after the report.

The VICE-CHANCELLOR said, as this form of proceeding did not give the Plaintiff any discovery from the mortgagor as to the existence or non-existence of subsequent incumbrances, which might create a defect in the title to be acquired under the decree, he should, in all such cases, give the Plaintiff the option either of taking an inquiry before the Master as to other incumbrances, suspending the final decree until after the report, or of taking the common decree of foreclosure in the first instance.

WEBB v. THE DIRECT LONDON & PORTSMOUTH RAILWAY COMPANY. July 5th & 9th.

A CLAIM for the specific performance of an agreement, dated the 23rd of July, 1845, signed by and made be-

A contract entered into by the promoters of a Railway

Company with a landowner, to pay a certain sum for the portion of his lands to be taken for the intended railway and for consequential damage, in consideration of which agreement the landowner withdrew his opposition to the bill,—*Held*, to be binding, although, after the passing of the Act, the intention of making the railway be abandoned, and no part of the land be taken or required.

Specific performance decreed of an agreement to pay, for the lands to be taken for a railway, a certain sum, which included not only the purchase-money of the lands, but compensation for the consequential damage to the property of the landowner; the case not being one in which compensation was under the Act a distinct subject of contract, but being merely an agreement by the landowner to accept a sum in full for the purchase and damage; the purchase being the substance of the agreement, and the damage an incident.

The fact that the Railway Company had, by the lapse of time, lost the powers which the legislature had given them to take lands, did not deprive them of the right to hold lands which they had acquired during the existence of their powers, nor did it release them from their obligations which they had then contracted with reference to the purchase of land.

The fact that the performance of an agreement has, owing to circumstances which have subsequently occurred, become hard in its consequences to one of the parties, or that he is called upon to perform it under circumstances which he had not contemplated, is no objection to the specific performance of the contract in equity, there being nothing doubtful in the meaning of the agreement, and nothing hard or oppressive in its terms at the time it was made—*Scmble*.

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tween *C. S. Crowley, B. Baines, and J. Laurie*, three of the promoters of an Act of Parliament for making a railway from the *Croydon and Epsom Railway*, at *Epsom*, to the town of *Portsmouth*, to be called "The Direct *London and Portsmouth Railway Company*," on behalf of themselves and all other the promoters of the said Act, of the one part; and the Plaintiff *P. B. Webb*, of the other part; whereby the said *C. S. Crowley, B. Baines, and J. Laurie* for themselves agreed with the said *P. B. Webb* as follows:—"*First*, that the Company to be incorporated under the said Act of Parliament, when passed, shall, at their own costs and charges, build, in a substantial and workmanlike manner, a bridge over the said railway between the points A. and B. mentioned in the plan or map annexed to the agreement, or at such other place as the said *P. B. Webb* shall by writing direct; and that such bridge shall be of the width of at least sixteen feet, so as to afford a convenient and sufficient carriage-way for wagons, carts, and carriages between the parts of the property of the said *P. B. Webb*, described in the plan, which shall be divided by the said railway, and shall for ever thereafter keep the said bridge and road-way thereon in good repair. *Secondly*, that the said Company shall deviate from their proposed line as delineated in the said plan, so far to the eastward thereof as to avoid altogether any interference with the piece of meadow land, the property of the said *P. B. Webb*, or the plantation round the same, distinguished in the said plan by the numbers of 152 and 153. *Thirdly*, that the said Company shall, if empowered so to do, purchase a piece of land, the property of the Dean and Chapter of *Salisbury*, containing by estimation one acre (more or less), which will lie between the said deviated line of railway on the one side, and the said piece of meadow land and plantation numbered 152 and 153, and the piece of land in the said plan marked 35, on the other side; and immediately, on such purchase being completed,



shall convey the same at their own costs and charges to the said *P. B. Webb*, his heirs or assigns, or as he or they shall direct, for a nominal consideration. *Fourthly*, that the said Company shall build, in a substantial and workman-like manner, an ornamental archway under their line of railway, between the points C. and D. mentioned in the said plan, so as to continue by means thereof the shrubbery walk there, which will be divided by the said railway, and shall keep the said archway for ever thereafter in good repair; and that such archway shall be of the width of ten feet at the least. *Fifthly*, that the said Company shall allow the said *P. B. Webb* a crossing over the said railway where the same shall traverse the land of the said *P. B. Webb* on a level between the points E. and F.; and the said Company shall erect and keep in repair proper gates on both sides of the said crossing, the gate on the west side thereof to be an ornamental one. *Sixthly*, that the said Company shall plant with evergreens, or other ornamental shrubs or trees, the western side of the embankments of the said railway, as far as it shall cross the property of the said *P. B. Webb* described in the said plan. *Seventhly*, that the said Company shall not erect any fence upon the surface of the ground above the said railway, where the same shall pass in a cutting, except an invisible iron fence; and if any telegraphic communication shall be set up by the side of the said railway, it shall be set up (as far as the same may be practicable) so as not to be within view from the mansion-house or pleasure-grounds of the said *P. B. Webb*. *Eighthly*, that the said Company shall not erect or build any station or other building on any part of the lands of the said *P. B. Webb* described in the said plan, which may be seen from the said mansion-house or the grounds surrounding the same. *Ninthly*, that the said Company shall not enter upon nor deposit spare or refuse earth or materials, or

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any other thing, on any of the said lands of the said *P. B. Webb* described in the said plan (except such as shall be taken by the said Company for the site of the said railway), for any purpose whatsoever, without the consent in writing of the said *P. B. Webb*. Lastly, that the said Company shall pay to the said *P. B. Webb* the sum of 4500*l.*, together with his costs, charges, and expenses incurred up to the day of the date of the agreement by reason of the intended formation of the said railway (not exceeding the sum of 150*l.*), before the Company shall enter on any of the lands of the said *P. B. Webb* for the purpose of making the said railway; and that all timber and other trees on the lands to be taken by the said Company shall be the property of the said *P. B. Webb*. And it is hereby declared, that the said sum of 4500*l.* is to be the purchase-money for the said lands so to be taken by the said Company as aforesaid for the formation of their railway, not exceeding eight acres, according to such deviated line as aforesaid, across the property of the said *P. B. Webb* described in the said plan, and for the consequential damage to such property."

A memorandum of the same date, written at the foot of the agreement, and signed by *C. J. Woods*, the Plaintiff's agent, was in the following words:—"It is understood and agreed by and between the parties above named, that, in the event of the Act of Parliament referred to in the foregoing agreement not being obtained, the agreement for purchase hereinbefore contained shall be null and void.

C. J. WOODS."

It was stated, and not denied, that this agreement was entered into, while the Company's bill, empowering them to make the railway, was pending in Parliament; and that the consideration for it was the withdrawal of the opposition of the Plaintiff as a landowner to the bill. On the

26th of June, 1846, the Act (The Direct *London and Portsmouth* Railway Act, 1845) (a) was passed.

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On the 5th of April, 1847, the Company executed an indenture under their seal, whereby it was witnessed, that the Company, in consideration of the withdrawal of the opposition of the said *P. B. Webb* to the therein mentioned bill, did thereby satisfy and confirm the said agreement of the 23rd of July, 1845, made on their behalf by the said *C. S. Crowley*, *B. Baines*, and *J. Laurie*, and did thereby for themselves, their successors, and assigns, covenant with the said *P. B. Webb*, his executors, &c., that they the said Company, their successors and assigns, would in all things perform, fulfil, and keep the covenants and agreements entered into in the said agreement by the said *C. S. Crowley*, *B. Baines*, and *J. Laurie*. And the said *P. B. Webb*, in consideration of the covenant thereinbefore entered into by the said Company, did thereby discharge and release the said *C. S. Crowley*, *B. Baines*, and *J. Laurie*, their heirs, executors, &c., from the observance and performance of the covenants and agreements in the said agreement contained, and on the part of the said Company to be observed and performed, and from all liability whatsoever in respect of the said agreement so entered into by them as aforesaid; and the said *P. B. Webb*, his heirs, executors, &c., did thereby covenant with the said Company, their successors and assigns, that he had not done or permitted any act, matter, or thing whereby he would be prevented or hindered from discharging or releasing the said *C. S. Crowley*, *B. Baines*, and *J. Laurie* from the said agreement.

The claim stated, that the Plaintiff had, prior to the date of the agreement, incurred costs, charges, and expenses, by reason of the intended formation of the railway, amounting to more than the sum of 150*l*. It appeared

(a) 9 & 10 Vict. c. lxxxiii.

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that the Company had entered upon the land for the purpose only of surveying and taking levels; and that, owing to difficulties which had subsequently arisen, the making of the railway had been abandoned, and the land was therefore not required by the Company. The situation of the Company with reference to the cessation of their parliamentary powers is observed upon in the argument and judgment. The Plaintiff by his claim offered specifically to perform the agreement on his part.

Argument.

The *Solicitor-General* and Mr. *Moxon* for the Plaintiff.

It will not be suggested, that the agreement is not binding upon the Company if they take the land and construct the railway, but the argument will probably be, that they are not bound to perform any of the acts which they have contracted to do, if it should not be found expedient to make the railway. The contract cannot, however, be treated as binding on one party and not on the other. There is nothing in the terms which renders it conditional, and the contrary is to be implied from the circumstances of the case. The Company have received the benefit for which they stipulated,—the Plaintiff withdrew his opposition to the bill, and precluded himself from dealing with his land for any other purpose. If the Company cannot now profitably carry out the undertaking, it does not follow that they have not derived a profit from obtaining the Act; but whether that be so or not, the Plaintiff has done his part, and he cannot be reinstated in his former position. The Company have, moreover, actually entered upon the lands, for the purpose of surveying and taking levels; and, according to the agreement, the purchase-money ought to have been paid before the entry of the Company for any purpose connected with the railway. The argument on the part of the Defendants, however, must go to the ex-

tent of contending, that, notwithstanding all that had been done on the Plaintiff's part, no obligation arose on the part of the Company. This would not only be unreasonable, but is opposed to recent authorities: *Preston v. Liverpool and Manchester Railway Company* (a), and, a case affecting the same Defendants, *Bland v. Crowley* (b).

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*Argument.*

Mr. Malins and Mr. Bovill for the Defendants.

1. It is impossible to read the agreement without seeing that it is founded upon the supposition that the land is to be taken, and the railway made through the lands of the Plaintiff. Every thing which is stipulated to be done by the Company,—building bridges, permitting the Plaintiff to cross, planting the embankments, all contemplate the actual making of the railway as a preliminary step. Not only are the terms of the agreement evidently and in their nature conditional upon the undertaking being carried out, so far as the Plaintiff's land is concerned, but it is equally impossible to imagine that the Company could have entered into the contract, except with the view of making the railway; and, therefore, it was undoubtedly conditional, in the contemplation of the Company and their agents.
2. The price of the land is not ascertained by the agreement. The 4500*l.* includes not only the price to be paid for the land, but the compensation for severance and consequential damage; and there is no means of separating the one from the other. If the Company were bound to purchase the land, they certainly would not be bound to pay compensation for a damage which can never occur. In this point, the case is distinguished from that before Lord Cranworth, in which the price to be paid for the land had been separated from the amount of the damage.
3. The Court will not by its decree compel the Company

(a) Before Lord Cranworth, 26th June, 1851.

(b) Exch., May, 1851.

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to do an act which the law does not allow. The time for taking land, or for exercising any of the powers given by the Company's [Act, has expired, and the Company is now in the situation of any other corporation, without the power of holding land in mortmain. The land must remain the property of the Plaintiff, even if the Company be compelled to pay for it. Lastly, if no other objection to specific performance exists, the Court will leave the Plaintiff to his remedy at law, in a case in which the consequence of enforcing the Plaintiff's demand will be to give him an advantage for which he did not contract, at the expense of the Defendants, by placing them in a position which they never contemplated and never intended to place themselves in, and from which if the contract does not sufficiently guard them, such omission is plainly the result of a mistake, oversight, or inadvertence. It is a principle distinctly laid down by Lord *Redesdale*, that, in coming for specific performance, not only must not a party "call upon another to do an act which he is not lawfully competent to do," as the Defendants submit is the case here; but that the Court will "refuse to enforce specific execution of agreements, when from the circumstances it is doubtful whether the party meant to contract to the extent that he is sought to be charged:" *Harnett v. Yielding* (a). And the same principle has been affirmed and acted upon in later cases, where the aid of the Court has been sought to enforce a hard contract: *Kimberley v. Jennings* (b). There is nothing to prevent the Plaintiff from proceeding at law, if he has, as he asserts, a legal right.

The *Solicitor-General*, in reply.—It is incorrect to say that the Defendants cannot hold the land, if they are compelled to purchase it. They may, by the 127th section of the General Act (c), hold even superfluous lands (which this

(a) 2 Sch. &amp; Lef. 554.

(b) 6 Sim. 340.

(c) Lands Clauses Consolidation Act, 8 &amp; 9 Vict. c. 18.

cannot be) for ten years, and even in the case of such lands they have the power to sell them again. Their compulsory powers of taking land have ceased, but not their power of holding lands purchased under antecedent contracts. The 6th section enables them to buy; the 123rd section took away the compulsory powers only. A clause (added in the House of Lords) to the Railway Abandonment Act (13 & 14 Vict. c. 83, s. 19), provides, that nothing therein contained should extend to release Companies from any liability to purchase land, where the agreement is part performed, or the purchase-money is fixed by the contract. The cases of "hard bargains," in which the Court refuses to interfere, are those in which the hardship existed at the time the contract was made, and not where the hardship (as in this case, if any there be,) arises entirely out of the subsequent circumstances, over which the party seeking to enforce the contract had no control.

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VICE-CHANCELLOR—(after stating the agreement, and the ratification of it by the Company after their incorporation by the Act):—

*July 9th.*  
 ———  
*Judgment.*

It is for specific performance of this agreement that the claim is filed. The Company, it appears, have entered on the lands comprised in the agreement, for the purpose of surveying and taking levels; but it is expressly denied that they have otherwise taken possession of the lands, or that they are now in possession of them; they have fallen into difficulties, and have abandoned the making of the railway, no part of which has been made over the lands in question; and the Company's powers have expired.

Four points have been urged by the Company in opposition to this claim. First, that the agreement was conditional on the Company's requiring the lands for the pur-

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pose of making the railway, and that the lands not being required there is no agreement; secondly, that the 4500*l.* was the price for the lands and for consequential damage, and that the price for the lands cannot be distinguished, and the Court therefore cannot decree a specific performance of the agreement to purchase them; thirdly, that, the powers of the Company having ceased, they cannot now take lands; and, fourthly, that the hardship of the case precludes the Court from decreeing the specific performance.

The first point depends on the construction of the whole agreement, and not on any particular clause of it. If the construction contended for be right, the agreement would be, in effect, an agreement for the purchase of the right to take the land, and not for the purchase of the land itself. It would be, that, if the Company took the land, they would give 4500*l.* for it and for the consequential damage. This is not a very probable contract for a landowner to enter into, and upon the faith of it to give up his opposition to the bill; but, of course, it might be so. The question to be considered is, whether it is so or not. Now, if this had been the meaning of the agreement, all the provisions of the agreement would, I think, have been made subject to it. But this is not the case; the provisions to build the bridge and make the archway are absolute, and dependent on no contingency; and even the very clause on which the argument is founded, could hardly be intended to be conditional as to the costs. The construction is not a necessary one. It is arrived at by considering the clause as to the payment of the 4500*l.* to override the whole of the agreement; but I see no reason for this construction. It may well be that the latter part,—“It is hereby declared that the said sum of 4500*l.* is to be the purchase-money for the said lands so to be taken by the said Company as aforesaid for the formation of their railway, not exceeding eight acres, according to such deviated line as



aforesaid, across the property of the said *P. B. Webb* described in the said plan, and for the consequential damage to such property;”—it may well be, that that should be construed as independent: that clause then contains a complete agreement to pay 4500*l.* for the purchase of land and consequential damage; and the part of the clause relied on, then becomes merely an agreement to pay the stipulated sum before entering. Having regard to the other clauses of the agreement, and to the provision as to costs, I am of opinion that this is the sound construction of the agreement, and that the Defendants’ first point cannot be maintained.

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*Judgment.*

It is then said, the 4500*l.* was for both land and consequential damage; and that the Court will not enforce the agreement, because no distinct price is fixed for the land. But this is not a case for compensation under the Act of Parliament, where compensation is a separate and distinct subject matter. It is merely an agreement by the Plaintiff to accept a certain sum in full for the purchase, and for all damage which he will sustain by the use which the Company are about to make of the land; and surely it cannot be maintained, that the Company are to be discharged of the contract, because they are unable to use the land for the purpose which they contemplated. The substance of the agreement is the purchase of the land. The damage to be done is an incident of the purchase; and I cannot hold that the substance of the agreement is defeated as to the vendor, because the incident fails by the default of the purchaser.

The third point raised was, that the Company could not now take the land:—but I expressed a strong inclination of opinion upon this point during the argument, and I see no reason to change that opinion. The argument was founded on the Company’s Act, which enacts, that at the

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expiration of five years from the passing thereof, the powers given to the Company by that Act, or by the general Acts, shall cease to be exercised, except as to so much of the railway as shall then have been completed (a). This clause merely takes away the powers granted to the Company, and does not, as I conceive, affect their obligations. It was argued, that one of their powers was to take the lands, and that this power is gone; but the answer to this argument is, that they have actually taken the land by the contract, by which they have become, in equity, the owners of it; that they have a right in the land, and not merely a power to take it, and that the Act does not take away the right. A different construction would put an end to all the contracts of all the Railway Companies throughout the kingdom which have not yet been completed, in all cases where the time limited by their Acts has expired.

With respect to the fourth point, the case of hardship:—I see no ground whatever on which I can refuse to interfere. The Company entered into this contract with their eyes open. They have had the benefit of the contract in the withdrawal of the opposition to the bill. There is nothing whatever to shew that the agreement was not originally a perfectly fair one; and if I refused a decree upon the ground of the subsequent inability of the Defendants to complete their railway, I must refuse it in all cases in which a purchaser finds that he cannot effect the purpose for which he entered into the contract.

Minute.

DECLARE that the agreement of the 23rd of July, 1845, was not conditional, upon the lands therein mentioned being taken for the purposes of the said railway, but that, according to the true construction of the said agreement, *Crowley, Barnes, and Laurie* thereby agreed

(a) 9 & 10 Vict. c. lxxxiii. Local and Personal.

absolutely to become the purchasers of the said land, and to give the sum of 4500*l.* for the same, and for all damage occasioned to the property of the Plaintiff in consequence of the same being taken for the purposes of the then intended railway. And Declare, that, by virtue of the indenture of the 5th of April, 1847, the Company are bound by the said agreement of the 23rd of July, 1845, and that the Plaintiff is entitled to have the said agreement specifically performed. Reference as to the title to the lands lying within the limits of deviation.

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TRAVIS v. MILNE.  
MILNE v. MILNE.

THE first suit arose out of the claims of the children and legatees of *Benjamin Travis* against his surviving partners and his executors; and the second suit was brought to enforce the claims of his surviving partners against his executors.

*Benjamin Travis* was, at the time of his decease, a partner in the firm of *Milne, Travis, and Milne*, who carried on the business of cotton spinning at certain cotton factories and works, at *Shaw*, in the county of *Lancaster*. The firm consisted of *James Milne of Cheetham Hill, Joshua Milne, James Milne of Heyside, and Benjamin Travis*. The business was not carried on under any written articles of partnership; but the property and profits of the firm were con-

April 23rd,  
24th, 25th, &  
26th.

May 29th.

A gift and devise by one of the partners in a cotton-mill, of all his property, estate, and effects, to trustees, upon trust, to lay out and invest two-third parts thereof upon real or good personal security, or to transfer the same, and allow it to remain in the concern, of which he was one of the co-partners, in the names of his trustees,

and alter, vary, change, and transpose the same as they should think fit, and stand possessed of the same, upon trust, for the two sons of the testator, with certain powers of advancement out of their respective shares:—*Held*, to authorise the executors to continue the monies of the testator in the trade, but not to trade with the monies by becoming partners in the firm.

The surviving partners of a testator dealing with the property of the testator, with the knowledge that it belongs to his estate, are bound to inquire into the trusts on which it is held, and are liable as if they had actual notice of those trusts.

A suit by parties beneficially interested in the estate of a deceased partner cannot be maintained against both his executors and surviving partners, in the absence of special circumstances; but collusion is not the only ground for such a suit; and it may be maintained where the relation between the executors and surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate as against such partners.

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sidered and treated as divided into sixty shares, of which twenty-eight belonged to *James Milne* of *Cheetham Hill*, fourteen to *Joshua Milne*, ten to *James Milne* of *Heyside*, and eight to *Benjamin Travis*. The business was carried on by all the partners until the death of *Benjamin Travis*, on the 10th of September, 1844. *Benjamin Travis*, by his will, dated the 19th of February, 1844, gave, devised, and bequeathed all and singular his freehold and leasehold property, estate, and effects whatsoever and wheresoever, and of what nature or kind soever the same might be, and whether the same might be property absolutely vested in him, or in him as a co-partner jointly or along with others, unto *Edward Evans*, *Joshua Cheetham*, *Abraham Crompton* the younger, and his (the testator's) wife *Eliza Travis*, upon trust, to stand possessed of and interested in his said property, estate, and effects, in trust, to lay out and invest two equal third parts thereof upon real or good personal securities, or to transfer the same and allow it to remain in the concern of which he was one of the co-partners, in the names of them his said trustees or the trustees for the time being of his will, and to alter, vary, change, and trans- pose the same as and when they should think fit, and to stand possessed of and interested in the said two equal third parts or shares of and in the said trust property, funds, stocks, and securities, in trust, to apply so much of the interest, dividends, and other annual proceeds thereof, as they might deem proper, in clothing, maintaining, educating, and bringing up to some trade or profession his (the testator's) two sons *Charles* and *Joseph*; and the testator directed that one moiety of the said two third parts of the said property, trust funds, stocks, and securities should be transferred to his son *Joseph* on his attaining twenty-one, (with a gift over to *Charles* in case of *Joseph's* death under that age without issue); and he directed that the other moiety of the said two third parts should be transferred to his son *Charles* on his attaining twenty-one; with a

similar gift over to *Joseph* in case of the death of *Charles* under that age without issue; and a gift over of the two-third parts, in the case of the death of both the sons under age and without issue; with the power of advancing a sum not exceeding 600*l.* to each of the two sons out of their respective third parts. And the testator directed the remaining one-third part of and in the said trust property, funds, stocks, and securities to be transferred to his wife *Eliza Travis*, immediately after his decease, subject nevertheless to and charged with the payment of his funeral expenses and debts, except the expenses which might be incurred in proving and carrying into execution the trusts of his will; and the testator thereby appointed *Edward Evans*, *Joshua Cheetham*, *Abraham Crompton* the younger, and his said wife *Eliza*, joint executors and executrix of his will.

Upon the death of *Benjamin Travis*, his widow *Eliza Travis* and *Edward Evans* proved the will; and it was afterwards, but not until November, 1847, proved by *Joshua Cheetham*.

In February, 1846, *Eliza Travis*, the widow, married *Richard Greaves*; and by the settlement made upon that marriage she assigned all the parts or shares and interest, as well vested as contingent, of and in the freehold and leasehold property, estate, and effects bequeathed to her by the said will, unto and to the use of *Edward Evans*, his heirs, executors, administrators, and assigns, in trust to pay the annual produce of the said trust premises to the said *Eliza* for life, for her separate use; and after her decease, then as to as well the capital as the future annual produce thereof, in trust for all the children of the said *Eliza*, whether by her said late husband or by her then intended husband, as she should by deed or will appoint; and in default of such appointment, in trust for her child if only

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one, or children if more than one, in equal shares; and in default of such issue, for her next of kin.

After the death of *Benjamin Travis*, the business continued to be carried on by the surviving partners (whether or not in partnership with the executors of *Benjamin Travis* or any of them, was a question in the cause,) until the 6th of July, 1847, when *James Milne* of *Heyside* died. He, by his will, appointed his widow *Sarah Milne* and several other persons to be his executors; and upon his death, his widow *Sarah Milne*, who alone proved his will, succeeded to his interest in the trade, and became a partner in the concern in his stead. The business was then carried on by *James Milne* of *Cheetham Hill*, *Joshua Milne*, and *Sarah Milne* (whether in partnership with the executors of *Benjamin Travis* was, as before, a question), until October, 1849, when the mills were stopped.

The bill in the first cause was filed in February, 1850, by the infant children of *Benjamin Travis* against *James Milne* and *Joshua Milne*, two of the surviving partners, and *Sarah Milne*, the representative of the other partner, and against *Eliza Greaves* the executrix and *Richard Greaves* her husband, *Edward Evans* and *Joshua Cheetham* the executors of *Benjamin Travis*, and against other parties interested under his will and under the settlement made upon the marriage of Mr. and Mrs. *Greaves*. The bill, in addition to the foregoing facts, stated, that the Defendants, *James Milne* of *Cheetham Hill*, and *Joshua Milne*, and *James Milne* of *Heyside*, after continuing the business from the death of *Benjamin Travis*, during the remainder of the year 1844, with the privity of the Defendants, *Eliza Greaves*, *Edward Evans*, and *Joshua Cheetham*, as such executrix and executors of *Benjamin Travis*, early in January, 1845, caused an account to be taken of the debts and assets of the partnership, and ascertained

therefrom the clear value of the property and effects of the partnership, and the amount and value of the share and interest of each partner therein; and that the share and interest of *Benjamin Travis* in the said property and effects was then ascertained to amount to the principal sum of 5122*l.* 15*s.* 4*d.*, and was entered and stood in the books of the partnership under the date of the 6th of January, 1845, at that sum; and the bill stated that the Defendants *Eliza Greaves*, *Edward Evans*, and *Joshua Cheetham* did not realise the testator's said share and interest in the partnership, but were induced by the representations of *James Milne* of *Cheetham Hill*, and *Joshua Milne*, and *James Milne* of *Heyside*, to leave the said trust monies in the business, and to trade therewith in partnership with them. The bill prayed that an account might be taken of all the dealings and transactions of the partnership of *Milne*, *Travis*, and *Milne*, from the commencement thereof, up to the 10th of September, 1844, and of the amount and value of the testator *Benjamin Travis's* interest therein on that day; and that an account might also be taken of the profits of the business since the 10th of September, 1844, and of all such sums of money as had been paid to or received by *Richard Greaves* and *Eliza* his wife, *Edward Evans*, and *Joshua Cheetham*, for or in respect of the said testator's interest in the partnership; and that *James Milne* of *Cheetham Hill*, *Joshua Milne*, *Sarah Milne*, *Richard Greaves* and *Eliza* his wife, *Edward Evans*, and *Joshua Cheetham*, might be severally decreed to pay the balance which should be found due on the same accounts; or, if it should appear more beneficial to the Plaintiffs, then that the Defendants might be severally charged with the said sum of 5122*l.* 15*s.* 4*d.*, with interest thereon from the 1st of January, 1845, and that the accounts might be taken on that footing; and that the Plaintiffs might be declared to have a lien on the existing property and effects of the partnership, to the amount of the sum which should be

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found due from the Defendants on the said accounts; and for a sale, if necessary, of the said property and effects; and that, if necessary, an account might be taken of the funeral and testamentary expenses and debts of the testator, which constituted a charge on the said third share of the Defendant *Eliza Greaves*; and if it should appear that all such expenses and debts had been duly paid, then that the two-third parts of the said testator's share and interest in the said partnership business and effects might be secured for the benefit of the Plaintiffs, and the persons entitled thereto under the will of *Benjamin Travis*. And the bill also prayed a dissolution of the partnership, and a receiver.

The Defendants *James Milne* of *Cheetham Hill*, and *Joshua Milne*, the surviving partners, by their answers in the first suit, in effect represented that the executors of *Benjamin Travis*, and the Defendant *Richard Greaves* after his marriage, took *Benjamin Travis's* share in the business, and became partners therein. They stated, that the value of the property and effects of the partnership, as ascertained by the account taken in January, 1845, and which they alleged to have been one of the usual annual stock takings, did not represent the actual value of such property and effects. The Defendant *Joshua Milne* admitted that he had notice of *Travis's* will, but the Defendant *James Milne* denied notice of it until November, 1849. The Defendant *Sarah Milne* (the representative of the other partner) by her answer made the same case as the surviving partners, with respect to the partnership with *Travis's* executors. The Defendants *Greaves* and his wife, and *Edward Evans*, admitted that the trust monies belonging to the testator's estate had been left in the firm, under the impression which they entertained, that they were justified in so doing by the words of the will; but they did not admit that they had become partners in the firm in respect of such monies. The Defendant *Joshua Cheetham*



denied the partnership as to himself, and relied principally on the fact, that he had not proved the will until recently, and insisted, that he ought not to be charged in respect of the acts of the other executors, which had previously taken place.

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The Defendant *James Milne* went into evidence to prove that the executors of *Travis* became partners in the concern; and that the 5122*l.* 15*s.* 4*d.* was not the true value of the share of *Benjamin Travis*.

The bill in the second suit was filed by *James Milne* against *Joshua Milne* (the other surviving partner), *Sarah Milne* the representative of *James Milne* of *Heyside*, and the executors of *Benjamin Travis*; and it prayed that the partnership of *Milne*, *Travis*, and *Milne* might be decreed to be dissolved, and *Edward Evans*, *Joshua Cheetham*, and *Eliza Travis* might be declared to have become partners in the said firm on the death of *Benjamin Travis*, and to have since continued such partners; and that *Sarah Milne*, on the death of *James Milne* of *Heyside*, might be declared also to have become a partner, and to have continued such partner; and that the accounts of the partnership dealings and transactions, from the 12th day of January, 1843, might be taken; and that the said *James Milne's* partners, including *Edward Evans*, *Joshua Cheetham*, *Richard Greaves* and *Eliza* his wife, and *Sarah Milne*, might be decreed to make good personally such losses as might properly fall to them respectively as such partners; and that the affairs of the partnership might be wound up under the direction of the Court; and for a receiver.

The causes were argued separately. The Plaintiffs in the first suit, at the hearing, asked no account of the profits of the trade subsequently to the death of *Benjamin*

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*Travis*, but desired payment of his share, with interest at 5*l.* per cent.; and they insisted, that the 5122*l.* 15*s.* 4*d.* ought to be taken to be the value of such share.

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The *Solicitor-General* and Mr. *Osborne* for the Plaintiffs, the sons of the testator *Benjamin Travis*.

Mr. *Rolt* and Mr. *Lewin* for *James Milne*, the surviving partner, a Defendant in the first cause, and the Plaintiff in the second cause.

Mr. *Bacon* and Mr. *Smythe* for *Joshua Milne*, and *Sarah Milne* the executrix of *James Milne of Heyside*, Defendants in both suits.

Mr. *Malins* and Mr. *Elmsley* for *Edward Evans* and *Richard Greaves* and *Eliza* his wife; and Mr. *Piggott* for *Joshua Cheetham*,—*Edward Evans*, *Joshua Cheetham*, and *Eliza Greaves*, being the executors and executrix of *Benjamin Travis*, and Defendants in both suits.

The following authorities were cited:—On the frame of the bill, in which the executors and debtors to the estate were made Defendants in the same suit: *Newland v. Champion* (a), where the case of partnership was distinguished, though collusion was the ground upon which such a suit was said to be alone sustainable, except in the case of partnership; *Law v. Law* (b), *Gedge v. Traill* (c), where the circumstances, though not charged as collusion, were held to be substantially so; *Bowsher v. Watkins* (d). *Holland v. Prior* (e), the case of the existing executor and the repre-

(a) 1 Ves. 105.

(b) 2 Coll. 41.

(c) 1 Russ. &amp; My. 281, n.

(d) 1 Russ. &amp; My. 277.

(e) 1 My. &amp; K. 237.

sentative of the deceased executor. On the liability of the partners to the Plaintiffs in the first suit, the cestui que trusts under the will of *Benjamin Travis*, in respect of his estate left in their hands: *Smith v. Jameson* (a) and *Wilson v. Moore* (b). On the liability of the executors, and on their rights as against the Defendant *Eliza Greaves*, as a cestui que trust, to be indemnified so far as her share would extend: *Booth v. Booth* (c). On the liability of the Defendant *Joshua Cheetham*, who had not proved the will until 1847, and long after the breach of trust (if any) had taken place: *Urch v. Walker* (d). And on the mode of dealing with and ascertaining the value of the testator's share in the partnership: *Cook v. Collingridge* (e) and *Wedderburn v. Wedderburn* (f).

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VICE-CHANCELLOR (after stating the case upon the pleadings and evidence):—

*May 29th.*  
 Judgment.

Upon the case being opened on the part of the Plaintiffs in the first suit, it was anticipated that the frame of the suit would be objected to by the Defendants, upon the ground of the surviving partners having been joined with the personal representatives of *Benjamin Travis* as Defendants to the bill; and the cases on the subject of suits by parties beneficially interested in the estate of a deceased partner against his executors and surviving partners were referred to; but this objection was not insisted upon by any of the Defendants, and it is unnecessary, therefore, further to consider the point. It may be useful, however, to observe, that, upon an examination of the authorities, I believe it

(a) 5 T. R. 601.

(b) 1 My. & K. 127.

(c) 1 Beav. 125.

(d) 3 My. & Cr. 702.

(e) Jac. 607.

(f) 2 Keen, 722; S. C., 4 My. & Cr. 41.

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will be found that there is no instance of such a suit being maintained in the absence of special circumstances, and that collusion is clearly not the only ground on which such a bill can be supported. The cases, I think, may fairly be considered to go to this extent,—that such a bill may be supported in all cases where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners. In the present case I entertain no doubt that the special circumstances are sufficient to maintain the bill.

The suit then being properly framed, the question first to be considered is, what is the true construction of the testator's will,—whether he has or has not by his will authorised his executors to concur with his surviving partners in carrying on the trade,—for this, I think, at least is clear, that if the executors were by the will authorised to carry on the trade, I cannot, in the state of the evidence, arrive at the conclusion, that they determined not to do so, and found a decree against the surviving partners upon that conclusion.

Now the testator has by his will given, devised, and bequeathed to his trustees, all and singular his freehold and leasehold property, estate, and effects, whatsoever and wheresoever, and of what nature or kind soever the same might be, and whether the same might be property absolutely vested in him, or in him as copartner jointly or along with others, upon trust, to stand possessed of and interested in his said property, estate, and effects,—that is, all his property, whether absolutely vested in him, or vested in him as a copartner jointly or along with others,—in trust, to lay out and invest two equal third parts thereof upon real or good personal securities, or to transfer the same

and allow it to remain in the concern of which he was one of the copartners, in the names of his said trustees, or the trustees for the time being of his will, and alter, vary, change, and transpose the same, as and when they should think fit. It is from this clause we have first to collect the intention of the testator: and it is to be remarked upon it, that two-thirds of the property only are embraced in the trust; and that the trust to invest upon "real or good personal securities," coupled with the power to vary, would extend to authorise the investment of the whole of the two-thirds upon those securities; and that it is not easy to see how the testator could contemplate the trade being carried on with two-thirds of the capital which he had in it, or being carried on at all on account of the estate, if the trustees were to have power to take out the two-thirds, whenever they thought fit to do so. It is to be remarked also, that the words "allow it to remain in the concern," seem to point more to a continuing fund than to a fund embarked in trade, and subject to all its contingencies. The provision for the transfer being in the name of the trustees, was relied on in support of the argument, that power was meant to be given to continue the trade; but I do not think much reliance can be placed upon it, for it would equally apply to the fund, whether considered as a debt or as a trade capital, and perhaps would apply to it more strictly in the former sense than in the latter; and besides, the sense in which the testator has used the word "transfer" in other parts of the will, and the application which he has, I think, made of the words "in the names of my trustees," both of the fund to be invested and of the fund to be transferred, seem to me to prevent any peculiar meaning being attached to this provision. Some reliance was also placed in support of the same argument, upon the fact of its having been usual to allow the executors of deceased partners to become partners in the trade; but I think it would be going much too far to hold, that

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this would be sufficient to warrant the Court in attaching a conventional meaning to the words of this clause in the will. Upon this point of the will, therefore, I think there was not enough to authorise the trustees in continuing the trade; and I think the rest of the will confirms that view; for the trust of the remaining third, and the charge of the debts upon it, shews that the testator contemplated the whole of his property as a fund immediately available; and the power to apply 600*l.* for the advancement of each of the children out of the capital of their shares, shews that the whole of the two-thirds were considered by him as a fund to which the trustees could at once resort. Upon the whole, therefore, I am of opinion, that this will did not authorise the executors and trustees to continue the testator's trade.

This being the construction of the will, I have next to consider the consequences of that construction: and I will first consider them as between the Plaintiffs and the surviving partners; and I think that the surviving partners, dealing with the property of the testator with knowledge that it belonged to his estate, were bound to inquire into the trusts on which it was held, and must all be liable as if they had had actual notice of those trusts, although actual notice is proved against one of them only.

I proceed, therefore, next to consider the extent of the liability of the surviving partners. The Plaintiffs have contended, that the testator's share ought to be taken at 5122*l.* 15*s.* 4*d.*, the amount of the valuation in January, 1845; and that the charge of debts on the widow's third gives them a right to call for the whole, and not for two-thirds only of the share. The Defendants, on the other hand, have gone into evidence to shew that the 5122*l.* 15*s.* 4*d.* exceeded the value of the share; and they rely upon their equity against the widow to protect them to the extent of her third.

With respect to the Plaintiffs' claim to have the testator's share taken at 5122*l.* 15*s.* 4*d.*, I think the Defendants have sufficiently proved that the account of January, 1845, was one of the usual annual stock-takings; and it is not, I think, to be assumed that such stock-takings truly represent the value and amount of the interests of the several partners in the concern. They may or may not do so according to the purposes for which and the mode in which they are made up. If the object of the stock-taking be merely to ascertain the profit or loss of the year, the correctness of the value set upon the several items, and of the allowance made for the several liabilities, is of infinitely less importance than where the object is to ascertain the exact value of the partner's share. In the former case, any error in the estimate would be set right in the final division. In the latter, there would be no opportunity of correcting it. The Plaintiffs in this suit have given no evidence as to the purposes for which, or the mode in which the stock-taking of 1845, on which they rely, was made up; but the Defendants, on the other hand, have proved that it was made for the purpose of ascertaining the profit or loss of the year, and have proved, in addition, several facts, from which it is clear it may not have been a correct criterion of the value. I am of opinion, therefore, that the Plaintiffs are not entitled to have the value of *Benjamin Travis's* share in the partnership taken at 5122*l.* 15*s.* 4*d.* It was attempted to support this part of the Plaintiffs' case upon the authority of *Cook v. Collingridge* (a), and *Wedderburn v. Wedderburn* (b), in which it was said, that there were valuations; but the Court did not act upon the valuation in either of these cases, and they do not therefore assist the Plaintiffs' argument upon this point.

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It is not to be assumed that the annual stock-taking by a partnership truly represents the interests of the several partners in the firm; but it may, or may not do so, according to the purposes for which, and the mode in which, it is made up.

With respect to the Plaintiffs' claim to charge the sur-

(a) *Jac.* 607.

(b) 2 *Keen*, 722; *S. C.*, 4 *My. & Cr.* 41.

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viving partners with the value of the whole, and not of two-thirds of *Benjamin Travis's* share, I think the question is not ripe for decision; for the Plaintiffs have neither alleged nor proved, that any of the testator's debts, or of the other charges upon the third, are remaining unpaid; and if they have been in fact paid, the Plaintiffs can have no claim in respect of that third; and the right in respect of it depends upon the equities between the surviving partners and the Defendants, *Greaves* and his wife.

These were, I think, all the points of the case as between the Plaintiffs and the surviving partners, with the exception of a point raised as to a lien on the remaining partnership property, which I think must also remain for future consideration. As between the Plaintiffs and the executors, the considerations which apply to the case are in some respects different. The executors have all admitted the testator's interest in the concern, and they must be responsible to the Plaintiffs in respect of that interest, unless they have in some manner discharged themselves from the liability. None of them have in this suit gone into any evidence for that purpose; but it was contended, on the part of *Evans*, and *Greaves* and his wife, who have joined in their defence, that the will authorised them to leave the monies in the trade; and that the passage read by the Plaintiffs from their answer (a) proved, that they had done only what they were authorised to do, and that the Plaintiffs in this suit could therefore have no relief against them. And on the part of the Defendant *Cheet-ham*, who severed in his defence, the same point was insisted upon; and it was further insisted, that, not having proved the will till 1847, and not having been called upon to act till 1849, when the concern was on the point of

(a) *Infra*, p. 155.



being stopped, he was no party even to leaving the money in the trade, and therefore cannot be held liable to the Plaintiffs in this suit.

I agree with the argument on the part of the executors, that they were authorised to leave the monies in the trade; but I am of opinion, as above stated, that they were not authorised to trade with the monies. The liability of these parties to the Plaintiffs in this suit depends, therefore, not upon whether the monies were in fact left in the trade, but upon the circumstances under which they were employed in it; and referring to the passage read from the answer of *Evans* and of *Greaves* and his wife, I find that after admitting that the monies were left in the trade, and that the trade was continued by the surviving partners, it states merely "that no written or other agreement or arrangement in reference to the business, or any articles of partnership, were ever made or entered into between them and the surviving partners; and that they took no part in the conduct or management of the business, and did not interfere therewith, or intend to embark therein, further or otherwise than as authorised by the will, and as appeared to them necessary for the due protection of the testator's share and interest in the capital thereof." But the Defendants do not state that they did not take to the share of their testator, without coming to any actual agreement or arrangement with the surviving partners; nor do they state to what extent they took part in or interfered in the business, or intended to embark in it; and I cannot venture upon this passage in the answer to hold, that these Defendants can, without further inquiry, be held discharged from the undoubted liability which attached upon them from their position as executors and trustees.

[His Honour then adverted to a portion of the corre-

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spondence before the bill was filed, and to the terms of the settlement made upon the marriage of the Defendants, *Greaves* and his wife, as leading also to the conclusion that further inquiry was necessary.]

With respect to the further point urged on the part of the Defendant *Cheetham*, I think, that, having proved the will in 1847, it became his duty then to interfere if the assets were not properly invested, and that he cannot justify having taken no step till the year 1849; and on this ground, and on the ground of the admission in his answer, that he attended meetings of the partners in July and December, 1849, and with respect to the dissolution of the partnership, I think there must be further inquiry as to this Defendant also. This appears to me to be the result of the case, so far as the first suit is concerned.

The bill in the second suit brings forward much more distinctly the facts in relation to the alleged partnership between the executors and the surviving partners. [His Honour stated the facts appearing upon the pleadings and in the evidence in the second suit, with reference to this part of the case.]

Although the Plaintiff has proved in the suit the signature by Mrs. *Greaves* of the stock-taking and memorandum, and has also adduced much evidence leading to the conclusion of a partnership having been formed with the executors, I think that, having regard to the interest which, in any event, the executors had in the business, from the testator's capital being in fact embarked in it, and looking to the statements read from the answers, and to the position of Mrs. *Greaves* as a married woman, the evidence on the part of the Plaintiff in the second suit is not such as would warrant me in declaring, that the executors did in fact become partners in the concern; but I

think the case is abundantly sufficient for further inquiry upon the subject.

DECLARE, that, according to the true construction of the will of the testator *Benjamin Travis*, his executors and trustees were not authorised to continue and carry on the said testator's trade or business in partnership with his surviving partners; and therefore declare that the Defendants *James Milne of Cheetham Hill*, and *Joshua Milne*, and the Defendant *Sarah Milne*, out of the assets of the said *James Milne of Heyside*, are liable to the Plaintiffs in the first suit for two-third parts of the amount and value, to be ascertained as hereinafter directed, of the said testator's share and interest in the partnership, in so far as the same may not have been accounted for and paid to the said executors and trustees, or any of them; but these declarations are to be without prejudice to any question as to the mode in which any payments which may have been made to the said executors and trustees, or any of them, in respect of such share or interest, ought to be applied; and the Court reserves all questions as to the liability of the said executors for the same two-third parts or shares of the said amount and value, and interest thereon; and also as to the said liability of the said *James Milne of Cheetham Hill*, *Joshua Milne*, and *Sarah Milne*, to the said Plaintiffs in the first suit, for the remaining one-third part of the said amount and value, and interest thereon. Refer it to the Master to take the accounts of the partnership of *Milne, Travis, & Milne*, from the commencement of the partnership in January, 1843, down to the time of the death of *Benjamin Travis*; and to ascertain and state what was the amount and value of the testator *Benjamin Travis's* share and interest in the partnership at the time of his decease; the Master to make such valuation of the said share as a share in a going concern. Refer it to the Master to compute interest at 5l. per cent. on two-thirds of what he shall find to be the amount and value of the said share and interest, and also to take an account of all sums of money paid to the executors and trustees, or any or either of them, in respect or on account of such share and interest, and to state when, and to whom, and under what circumstances the same were respectively paid. Refer it to the Master to inquire and state, whether the funeral expenses and debts of the testator *Benjamin Travis* have been paid, and if so, by whom and out of what funds. Dissolve the partnership of *Milne, Travis, & Milne*, and appoint a receiver of the partnership property remaining undisposed of. Direct an issue to try whether *Joshua Cheetham*, *Edward Evans*, and *Richard Greaves* and *Eliza* his wife, or any or either and which of them, at any time and when, became partners or a partner in the trade or business. *James Milne* to be Plaintiff in the issue,—the executors Defendants. Reserve further directions and costs.

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The rule which allows a solicitor, being also a trustee and a party to a cause, to charge full costs, where he acts in the suit for a body of trustees, of which he himself is one, does not apply to the case of a solicitor being a trustee and acting as solicitor for himself and his co-trustees in the administration of the trust estate out of Court.

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*Statement.*

## LINCOLN v. WINDSOR.

THE parties beneficially interested in several leasehold messuages and tenements, and other personal estate, under a marriage settlement, filed their bill against *Windsor* and *Selby*, the trustees of the settlement, for an account of the trust property, including accounts both of the proceeds and the income, a part of the property having been sold under powers vested in the trustees for the payment of incumbrances upon it.

The bill charged, that the Defendant *Selby* had, at different times, sent to the Defendant *Windsor* some accounts relative to the trust property, purporting to be the accounts of Messrs. *T. & G. Selby*, solicitors, with the trustees of the settlement; and that it appeared from such accounts, that various sums of money had at different times been retained by the Defendant *Selby*, or by the firm of *T. & G. Selby*, out of the said trust property, and applied in satisfaction of different bills of costs, claimed to be due from the trustees or from the trust estate to the said firm; that the Defendant *Selby* was one of the two partners in the said firm of *T. & G. Selby*; that various other bills of costs had at different times, since the date of the settlement, been retained by the Defendants, or by the Defendant *Selby*, or retained by or paid to the firm of *T. & G. Selby* out of the trust property; that the greater part of the different items contained in the said several bills of costs had been improperly charged by the trustees, or by the Defendant *George Selby*, or by the firm of *T. & G. Selby*, against the trust estate, and that the same ought to be disallowed.

The Defendants by their answer admitted, that the accounts which had been delivered included certain items of charge for Messrs. *T. & G. Selby's* bills, in the years 1832,

1834, and 1835; and they said, that the first of such bills, for the most part, related to the payment off of mortgages, and the redemption of an annuity affecting the trust property; and a large proportion, if not the principal part, of the charges composing such items were payable to the said Messrs. *T. & G. Selby* as solicitors for the mortgagees of, and incumbrancers upon, the trust property, and not as solicitors for or on behalf of the said trust estate, although in point of form such charges were not made out by Messrs. *T. & G. Selby* in their character of solicitors to the said mortgagees and incumbrancers; and they admitted, that the Defendant *Selby* had been a partner in the firm of *T. & G. Selby* until some time in 1844.

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Mr. *Hallett* for the Plaintiffs submitted, that, in taking the accounts, the Master should be directed to disallow all charges for costs paid out of the trust property to the firm in which the trustee was a partner: *Moore v. Frowd* (a). The principle which prevented a trustee from making a profit of his office was clear: *New v. Jones* (b); and it equally applied whether the trustee was acting alone, or in partnership with another solicitor: *Christophers v. White* (c).

Argument.

The *Solicitor-General* and Mr. *Metcalfe* for the Defendants relied upon the case of *Cradock v. Piper* (d), in which Lord *Cottenham* decided, that where a trustee acts as a solicitor for other parties as well as himself, he is no longer acting purely as a trustee; and that the rule as to costs, which had been theretofore laid down, did not apply to such a case. In this case, the firm in which the Defendant *Selby* was a partner, had acted as solicitors for the

(a) 3 My. & Cr. 51.

(c) 10 Beav. 523.

(b) 1 Mac. & G. 668, n.; S. C.,  
1 H. & T. 634, n.

(d) 1 Mac. & G. 664; S. C., 1  
H. & T. 617.

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 Judgment.

Defendant *Windsor*, the other trustee, and for the cestui que trusts.

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VICE-CHANCELLOR:—

The Defendant *Selby*, one of the trustees, was a solicitor, in partnership with another, and the firm in which he was partner has acted as solicitors for his co-trustee and for the cestui que trusts, in business relating to the trust estate. The firm have made out their bills of costs against the estate. The question is, what is to be done with regard to costs, where one of the trustees acts as solicitor for himself and his co-trustee or the cestui que trusts, in matters relating to the trust. According to decisions of Lord *Langdale* in *Christophers v. White* (a), and other cases, if a solicitor acts either for himself alone, being sole trustee, or for himself and others who are his co-trustees, in matters relating to the trust, he cannot be allowed to charge the trust estate with costs, except with costs out of pocket. In the case of *Cradock v. Piper* (b), however, it was decided by Lord *Cottenham*, that where the trustee happens to be a solicitor, and in a suit relating to the trust acts as a solicitor for himself and his co-trustees, appearing jointly for himself and them, he shall be allowed the full costs which would be properly chargeable in such a case by a stranger to the trust; the rule being however guarded, by providing that the costs are not to be increased by the solicitor being one of those parties. Lord *Cottenham* says "that the costs of the parties for whom the solicitor appeared, and for whom he had a right to appear, and for which appearance, according to the rule I have laid down, he had a right to recover full costs, ought not to be diminished by the circumstance of his being a party associated with them, that association not increasing the costs of the client." This establishes a distinction

(a) 10 Beav. 523. (b) 1 Mac. & G. 668; S. C., 1 H. & T. 617.

between the case of costs incurred in a suit and the case of costs incurred in the administration of an estate without a suit. The general principle of the rule disallowing professional charges by a trustee was, that a trustee was not permitted to profit by his trust, or to place himself in a situation in which he might be tempted to deal with his trust with a view to his own profit. If a solicitor, being a trustee, be brought in and made a party to a suit, owing to his connection with the trust, and the costs of the suit are not increased by any conduct of his own, there does not appear to be any reason why he should not be allowed his costs. The reason of the general rule is inapplicable to the case of a suit under such circumstances. I do not, however, think that this extends to the case of the costs of administration out of Court. I think, therefore, that, upon the general rule, the charges in the bills of costs of the Messrs. *Selby*, in respect of the trust estate, cannot be allowed, except in so far as they may be chargeable as costs out of pocket.

There appear to be some cases in which Messrs. *Selby* acted as solicitors in respect of the property comprised in the trust, not only for the trustees but also for the mortgagees. I do not see any objection to allowing the bills of costs so far as such costs are properly attributable to the mortgagees.

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## COLLETT v. MORRISON.

If upon a proposal and agreement for a life insurance, a policy be drawn up by the insurance office in a form which differs from the terms of the agreement, and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement, and not on that of the policy.

The stat. 14 Geo. 3, c. 48, does not prohibit a policy of life insurance from being granted to one person in trust for another, where the names of both persons appear upon the face of the instrument; nor does the effecting of such an insurance in any way contravene the policy of the statute.

An insurance Company having had the chance of a contract of life insurance turning out in their favour, cannot afterwards be permitted, on the ground of the inconsistency of the contract with their rules, to escape from it.

THE Plaintiff, as the personal representative of *Emma Collett* his deceased wife, brought his bill against the managing director of the *Britannia* Life Assurance Company, to recover 999*l.* upon a policy of insurance effected with that Company on the life of his said wife.

It appeared, that, on the 9th of September, 1844, *W. J. Richardson* (who also was a Defendant to the bill) went to the office of the Company, and stated that he wished to effect an assurance on the life of *Mrs. Collett*. *Mrs. Collett* was then and had for some time been living separate from her husband, with an allowance from him for her separate maintenance. *Richardson* having been, on his application, furnished with one of the ordinary printed forms of proposal, filled it up, and handed it back to one of the Company's officers. This printed form was headed "Proposal for Assurance," and contained amongst others the four following inquiries: 1. "Name, residence, and description of the party proposing the assurance." 2. "Name, residence, and rank, profession, or occupation of the party whose life is to be assured." 3. "If of sober and temperate habits." 4. "If now or ever afflicted with fits or any of the other enumerated disorders, or any other disorder tending to shorten life." The Defendant *Richardson* answered these inquiries in the form, which he then filled up:—To the first, "*Mrs. Emma Collett*, of 8, *Hans-place*, *Sloane-street*, by her trustee, *W. J. Richardson*, 51, *York-street*, *Portman-square*." To the second, "The daughter of the late *Sir Thomas Gage*, Bart., and wife of *John Collett*, Esq., M. P." To the third, "Both." To the fourth, "Not that I know of." And *Richardson* signed the pro-



posal. The usual inquiries having been made as to the health of Mrs. *Collett*, the proposal was, on the 16th of September, laid before the directors, who agreed to accept the life, and to insure it for the amount proposed. The usual notice having been given to *Richardson* that the life was accepted, and that the premium was to be paid within thirty days, he, on the 19th of September, again went to the Company's office, and he then filled up and signed another of the ordinary printed forms of proposal, in which the answer to the first of the above questions was not as before, but was simply "*W. J. Richardson*, of 51, *York-street, Portman-square*, in the county of *Middlesex*, Esq.; and the answer to the fourth of the above questions, instead of "Not that I know of," was "No." The answers to the other questions were the same as in the former proposal. On this occasion *Richardson* paid 36*l.* 9*s.* 2*d.*, being the first year's premium and the stamp duty on the policy, for which a receipt was given by one of the officers of the Company in the following words: "*Britannia Life Office*, 1, *Prince's-street, Bank, London*. 19th September, 1844. Policy No. 5194. Date, 9th September, 1844. Sum assured, 999*l.* Premium, 34*l.* 9*s.* 2*d.*—Sir, I beg to acknowledge the receipt of 36*l.* 9*s.* 2*d.*, being the first year's premium and stamp duty for an assurance of 999*l.* effected by you with the *Britannia Life Assurance Company* on the life of Mrs. *Emma Collett*, the particulars of which will be expressed on a policy bearing the number and date above mentioned. Signed, *James Brown*, for *Peter Morrison*, Resident Director."—The two proposals, signed by *Richardson*, were annexed together; and across the first proposal, signed on the 9th of September, was written "See proposal annexed." The first proposal was indorsed "Accepted, 16th September, 1844. Notice paid 19th." The like indorsement was made on the second proposal, with the addition of the words "Dated 9th." The second proposal, signed on the 19th of September (although purporting by

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the indorsement to have been accepted on the 16th of September) did not appear to have been laid before the directors. The policy was soon afterwards issued, and was in the following form:—"Whereas *W. J. Richardson*, of &c, Esquire, the person assured by this policy, hath agreed to effect an assurance with the *Britannia Life Assurance Company*, in the sum of 999*l.*, on the life of *Emma Collett* of *Hans-place, Sloane-street*, in the said county of *Middlesex*, wife of *John Collett*, Esquire, M. P., for the whole continuance thereof, and hath caused to be delivered in the office of the said Company, a declaration or statement in writing, signed by him the said assured, bearing date the 9th day of September, instant, declaring that the age of the said person on whose life the assurance is effected, did not then exceed forty-six years; that she had had the small pox or cow pox; that she was not then and had not ever been affected with gout, asthma, hernia, fits, or spitting of blood; and that she was not afflicted with any disorder tending to shorten life; and that he the said assured agreed that such declaration or statement should be the basis of the contract between him and the said Company: and whereas the said assured hath paid the sum of 34*l.* 9*s.* 2*d.*, as a premium for twelve calendar months, commencing on the day of the date of this policy, the receipt whereof is hereby acknowledged, and the said assured hath agreed to pay the like premium at the expiration of every twelve calendar months during the life of the said person, on whose life the assurance is effected, as a consideration for the sum hereby assured: Now this policy witnesseth, that if the said person on whose life the assurance is effected, shall die previously to the expiration of twelve calendar months, to be computed from the day next before the day of the date of this policy, or in the event of her living beyond the said term, if the said assured or his assigns shall pay the premium of 34*l.* 9*s.* 2*d.*, on or before the expiration of twelve calendar months, to be computed from the day of the date hereof,

and at the expiration of every subsequent twelve calendar months during the life of the said person on whose life the assurance is effected, the funds or property of the Company shall be subject and liable according to the Company's deed of settlement, bearing date the 1st day of August, 1837, to satisfy and pay unto the said *W. J. Richardson*, his executors, administrators, appointees, or assigns, the sum of 999*l.* within three calendar months next after satisfactory proof of the death of the said *Emma Collett* shall have been received at the office of the Company: Provided always, that if anything averred by the assured in the declaration or statement hereinbefore mentioned, (except as to the age of the said person on whose life the assurance is effected, which is hereby admitted to have been proved to the satisfaction of the board of directors,) shall be untrue, this policy shall be absolutely void: Provided also, that this policy and the assurance hereby effected are and shall be subject to the conditions and regulations hereupon indorsed, so far as the same are and shall be applicable, in the same manner as if the same respectively were repeated and incorporated in this policy. In witness, &c." The only material condition or regulation indorsed upon the policy was the 4th: "That in every case where any policy issued by the Company shall be, at the time of issuing the same, or shall at any time afterwards become, subject to any trusts whatsoever, the receipt of the trustee or trustees for the time being for the sum assured by such policy shall, notwithstanding any equitable claim or demand whatsoever of the person or persons beneficially entitled to the policy or sum assured thereby, be an effectual discharge to the Company and proprietors thereof." The policy, when issued, was sent from the office of the Company to *Mrs. Collett*.

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*Mrs. Collett* died in June, 1845. Upon her death *Richardson* set up a claim to the policy for his own benefit,

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and brought an action against the Company to recover the sum assured, to which the Company pleaded the general issue;—that *Richardson* had no interest in the life assured, and that the policy was void for fraud and misrepresentation. The Plaintiff thereupon filed a bill against *Richardson*, praying that he might be declared a trustee of the policy, and might be decreed to permit the Plaintiff to use his name in giving discharges for the sum assured and in proceeding at law upon the policy; and for an injunction to restrain the action in this suit, to which the Company were not parties. An issue was directed to try the question, whether *Richardson* was a trustee of the policy; but the issue was not tried, the parties having agreed that a verdict should be found for the Plaintiff, subject to a reference. The arbitrator made his award on the 7th of March, 1849, by which he found that the policy was effected by *Richardson*, as a trustee, and for the benefit of Mrs. *Collett*, that the verdict should stand, that no further proceedings should be taken in the suit, that *Richardson* was a trustee for the Plaintiff, and that the Plaintiff should be at liberty to use *Richardson's* name in giving receipts for payment of the money due on the policy, the Plaintiff indemnifying *Richardson*, that *Richardson* should not proceed in his action against the Company or receive or release the money due on the policy, or do any act, or interfere in any manner to prevent the Plaintiff from receiving such money.

In this state of circumstances the bill was filed. The bill stated, that the Plaintiff was about to proceed at law for the recovery of the amount due on the policy; but that any action brought to recover the same must be brought in the name of *Richardson*, and would fail by reason of the claims and acts of *Richardson* fraudulently set up and done, and his fraudulent collusion with the Company; that, as a defence to such action, the Company intended to set up

that *Richardson* did not effect the policy as trustee, but for his own benefit, and to plead that *Richardson* had no interest in such policy. The bill stated, that *Richardson* had furnished the Company with declarations and statements, and had concurred with them in acts which would, in an action in his name, be evidence that the policy was effected not as a trustee, but for his own benefit, and, although contrary to the real truth of the case, would enable the Company to defeat the action; and it also charged, that the Company, as part of the case which they intended to set up at law, insisted, that the proposal signed on the 19th of September was in substitution of the proposal signed on the 9th of September, and that the policy was granted on the substituted proposal. The bill charged, that the proposal of the 19th of September was antedated, and was signed by *Richardson* on that day, after the proposal of *Emma Collett* by *Richardson*, as her trustee, had been accepted; and that such second form of proposal was never even laid before the directors, and never was accepted by them, nor was any notice thereof ever communicated to *Emma Collett*; that, after accepting the proposal made on behalf of *Emma Collett* by her said trustee, it was against equity and good conscience for the Company, dealing with *Richardson* as such trustee, to take from him a document such as the second proposal, so as to make evidence to the injury of *Emma Collett*, his cestui que trust. The bill set forth a letter from *Richardson* to the secretary of the Company, dated the 13th of September, 1845, in which he asserted the policy to belong to him, and to have been effected by him for his own benefit; and charged that he had in other letters and statements, written and made to the officers of the Company and others, repeated the same assertions, so as to furnish conclusive evidence to that effect in any action in his name on the policy; and that the Company intended to avail themselves thereof in any action which the Plaintiff might bring against them

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on the policy, for the purpose of founding their defence on the want of interest in *Richardson*, who, in truth, had no insurable interest on the life of *Emma Collett*.

The bill then charged, that, immediately after the award, which determined that *Richardson* was a trustee of the policy, *Richardson* put himself in communication with the Company, to assist them in defeating any claim of the Plaintiff on the policy; and that the Company and *Richardson* had concerted together how to get up evidence against the Plaintiff's claim; and the bill set out certain letters of *Richardson* to the solicitors of the Company, written for the purpose of pointing their attention to such evidence.

The bill then suggested, that the Company alleged they were not liable to pay anything to the Plaintiff in respect of the policy, inasmuch as the same was not consistent in form with the provisions of the statute 14 Geo. 3, c. 48, whereby it is enacted, "that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use or benefit or on whose account such policy is so made or underwrote." The bill charged, that the Company insisted that upon the policy itself it must be taken to be a policy really effected by *Richardson* on his own account on the life of *Emma Collett*; and that, if the Plaintiff should at law insist, according to the fact, that the same was made by *Richardson* for *Emma Collett* herself, and that it was a policy by herself on her own life, then the Company would insist that, according to the provisions of the said statute, it ought to have been expressly stated in such policy that the same was effected for her use and benefit.

The bill charged, that it was well known to the Com-

pany, at the time of effecting the assurance and preparing the policy, that *Richardson* had no such interest in the life of *Emma Collett*, and that the insurance was not made on the basis of or with reference to any such interest; that the circumstances of the policy having been framed so as not to express the real truth and nature of the transaction, and so as to make the transaction appear in contravention of the provisions of the statute, when in truth it was not, arose either from mistake, or, if not from mistake, then from actual fraud on the part of the Company; of which mistake or fraud it was against equity and good conscience that they should now avail themselves; that there was in fact a perfect contract between the Company and *Emma Collett*, by *Richardson* as her trustee, made and completed by such proposal and acceptance and payment of the premium; and that such contract did not, either in substance or form, contravene any statutory provision as to policies of insurance.

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The bill prayed a declaration that the insurance was to be treated in equity as an insurance effected by *Emma Collett* through *Richardson* as her trustee, for her separate use, on her own life; and that the Plaintiff was entitled to have the policy rectified accordingly, or treated and considered as if so rectified; and that the Company might be decreed to pay to the Plaintiff the 999*l.* with interest from the day of the death of *Emma Collett*; and that it might be declared that *Richardson* had been guilty of a fraudulent breach of trust in respect of the policy, and in collusion with the Company; and that the Company and *Richardson* might pay the costs of the suit.

The Defendant *Morrison*, on the part of the Company, by his answer to the bill, stated that the persons who, on behalf of the Company, attended to the effecting of the insurance, were *Brown* a clerk, and *Nayler* the actuary

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of the Company; that he had been informed and believed, that the application for the insurance, on the 9th of September, was made by *Richardson*, on his own behalf; that it was, on behalf of the Company, taken for granted that the proposal filled up by *Richardson* on the 9th of September, was filled up as being made by *Richardson*, simply in conformity to the wish he had expressed to effect an insurance on the life of *Mrs. Collett*; but that it was not at the time particularly noticed in what manner the form was filled up; that *Nayler* and *Brown* considered that the form of the proposal was objected to by one of them at a subsequent period, but that neither of them could speak positively on the point: that he could not recollect whether the directors or any of them looked into all the details of the proposal of *Richardson*, or the form in which it was made; but that it was not the custom of the directors to do so; and that it was their custom merely to consider the amount to be insured, the age of the person on whose life the policy was to be granted, and the opinion of their medical officer as to the life proposed; and that the directors agreed to accept *Mrs. Collett's* life, and to insure it for the amount proposed, believing the proposal to have been made by and for the benefit of a party really interested in the life, and to have been filled up in accordance with the practice of the Company; that he believed that *Mr. Brown*, on the 19th of September, for the first time, observed on the proposal the words "*Mrs. Emma Collett*, by her trustee *W. J. Richardson*;" and that it was then that either *Nayler*, *Brown*, or *Francis* the chief clerk of the Company, stated to *Richardson*, as the fact was, that no policy could be granted of that nature, for that the Company could not recognise or enter into any question of a trust, but could deal only with the person really to be insured, or words to that effect; and that *Richardson* thereupon represented, as he had before done, that he was himself the person to be insured; that he had been informed and believed, that



one of the said three officers of the Company thereupon said that the proposal must be altered accordingly, and *Brown* then filled up, in his own writing, another form of proposal, which was then signed by *Richardson*; but the first of the said forms was the only one before the directors, although both were afterwards indorsed as accepted. The Defendant said, he had been informed by *Brown* and *Naylor*, and he believed that they understood and considered, from the expressions of *Richardson*, that his object was to protect his own interest in the life of *Emma Collett*, and the Defendant had been positively assured by *Richardson* that such was the fact; that although the said form of proposal was laid before the directors on the 16th of September, yet the same was so laid before them, merely to consider whether the life was one which the Company would accept, the amount to be assured, and the age of the person whose life was proposed, and not with reference to any other details in the proposal; that the policy was a proper policy for the only proposal which had been accepted by or on behalf of the Company, namely, a proposal to insure *Richardson* against the death of *Emma Collett*; that all policies of the Company of the nature of the one in question were made, and the policy in question was made, on the supposition of an interest in the person to be insured, which, in this case, was *Richardson*, although the Company were not then accustomed to inquire, and did not inquire, into the nature or amount of such interest. And the answer insisted, that if it should appear (as the Defendant and the Company believed) that *Richardson* had no such interest in the life assured, the policy was for that reason void under the statute 14 Geo. 3, c. 48, and nothing was recoverable in respect thereof except the premium paid; and at all events nothing was recoverable in respect thereof by the Plaintiff, if it should further appear (as the Defendant and the Company believed,) that the premium was not paid out of the monies of *Emma Collett*.

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*Nayler, Brown, and Francis* were examined in the cause as witnesses on behalf of the Company. It is not necessary to state the evidence further than that the conclusion of the Court upon it was, that it fell far short of what was alleged by the answer; that there was no proof that the application for the insurance on the 9th of September was made by *Richardson* on his own behalf, or even that it was believed to be so; and that it was not proved that the directors did not examine into the details of the proposal (which the witness *Francis* stated it was their practice to do); and that the evidence failed to support the allegation of the answer as to what passed on the occasion of the second proposal.

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*Argument.*  
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The *Solicitor-General* and Mr. *W. M. James* for the Plaintiff.

Mr. *Rolt* and Mr. *Cairns* for the Defendant *Morrison*, the managing director of the Insurance Company, relied upon the case raised by the answer. They contended, that the first proposal was abandoned, and that the policy was founded upon the second proposal; that there was nothing in the fact of *Richardson* having at one time made a proposal as trustee, to prevent the Company from afterwards contracting with him on his own account; and they contended moreover that the policy, not being under seal, might be sued upon at law in the name of the Plaintiff; and that therefore the suit in equity was unnecessary and improper.

Mr. *Baily*, for *Richardson*, submitted that he should be treated as a trustee in respect of costs. The Defendant had, it was true, claimed to be the owner of the policy; but that claim had been determined against him in another suit, and he had made no claim in this suit.

VICE-CHANCELLOR:—

The question first to be considered is, what is the course of the Court in cases of this nature? And fortunately there is no difficulty upon this point, as there is direct authority upon it. In *Motteux v. The London Assurance Company* (a), the insurance of a ship was made by the policy to commence from the time of her departure from *Fort St. George*, instead of commencing from the time she should arrive at *Fort St. George*, as according to the label of the agreement it ought to have been. Lord *Hardwicke* there says: "The label is the memorandum of the agreement, in which the material parts of the policy are inserted." "In the label the words are 'at and from.' This certainly includes the continuance at *Fort St. George*; and in the first part of the policy the voyage is described in the same manner; but in the latter, according to the constant form, it points out what shall be called the risk; and the adventure there is confined to the departure only from *Fort St. George*. It has been contended on the part of the Plaintiffs, that it ought to be construed equally the same as if the words 'at and from' were actually inserted in this part of the policy. It is pretty difficult to reconcile the first part of the policy and the latter, but the label makes it very clear; for that considers the voyage and the risk as the same; and therefore it was only the mistake of the clerk, which ought to be rectified agreeable to the label."

This case appears to me fully to establish, that if there be an agreement for a policy in a particular form, and the policy be drawn up by the office in a different form, varying the right of the party assured, a Court of Equity will interfere and deal with the case upon the footing of the agreement and not of the policy. Authority perhaps was not wanted upon the point, as it is the constant course of

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(a) 1 Atk. 545.

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the Court to rectify mistakes, and the decisions upon that subject would seem to govern the question; but it is satisfactory to find a case which in principle so nearly resembles the present.

Adopting, then, the principle of the case and of the decisions to which I have referred, I have next to consider whether there was in this case an agreement to grant the policy to *Richardson* in trust for *Mrs. Collett*.

It is said on the part of the Company that there was no such agreement. First, because the examination of the directors extended only to the age and the health of the party on whose life the insurance was proposed, and to the amount of the insurance; and secondly, because the approval of the directors was subject to its being afterwards found by the officers of the Company that the proposal approved could be carried into effect consistently with its rules and regulations. But, with reference to the first of these grounds, one of the Defendant's own witnesses states, that the directors, in considering proposals, looked to the names of the proposers; and another of their witnesses states, that it was impossible to have read the first proposal without seeing the words "*Mrs. Emma Collett, by W. J. Richardson, Esq., her trustee;*" and I cannot impute to these directors that they did not in this case look to a matter to which it was their habit to look, or that they overlooked what so clearly appeared on the face of the proposal; and with reference to the second ground, which is very loosely, if at all, alleged by the answer, I do not find that the evidence goes nearly so far, or at all shews that it was not the duty of the officers of this Company to act upon any proposal approved by the directors, if it could in any way be carried out. Even supposing that the officers had a more extended power, and could alter the substance of the agreement, and not merely the

form of carrying it out, surely the agreement of the directors remained if the officers acted upon it, and meant to alter it in form only and not in substance.

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It is to be seen, therefore, what was the opinion of the officers of the Company with reference to the proposal in question in this case. Did they or did they not take the second proposal, and prepare the policy in its present form, for the purpose of carrying out the first proposal? The evidence, I think, leaves no doubt upon this subject. The witnesses on the part of the Company do not state that the policy was prepared with any different view; and indeed the point raised by the answer is, that there was no original contract, not that there was a substituted one. The original proposal is not cancelled, but it is annexed to the second proposal. The payment of the premium is indorsed upon it. The second proposal is not even submitted to the directors, by whom, and not by the officers, any contract binding upon the Company would be to be made; and the policy, when issued, is sent to Mrs. Collett. I am of opinion, therefore, that the directors must be held to have accepted the first proposal wholly, and not in part only; and that, at the time when this policy was issued, the agreement made with the directors by the acceptance of the first proposal remained in force—conclusions at which I arrive the more readily, from its appearing by the fourth condition, indorsed upon the policy, that it was contemplated that policies might be issued which were subject to trusts at the time of being granted.

It may be said, indeed, that, taking the rules and regulations of the Company and the provisions of the statute together, the agreement made upon the first proposal could not by any means have been carried out; and that the Court, therefore, ought not now to act upon it; but, independently of what I have already observed as to poli-

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cies in trust being contemplated, I think that the Company, having had the chance of the agreement turning out in their favour, cannot be permitted to escape from it now that it has turned out against them.

With reference to the questions raised upon the statute, I do not think it necessary to enter into them. If the statute had prohibited any policy being granted to one person in trust for another, where both names appeared upon the face of the policy, or if the effecting such an assurance had in any manner contravened the policy of the statute, I might have felt myself bound to abstain from any interference; but I am of opinion that the statute has no such operation, and is directed to a wholly different object.

It was suggested, on the part of the Company, that, the policy not being under seal, the Plaintiff might bring an action upon it in his own name. I much doubt whether, under the circumstances of this case, such an action could be maintained; and, at all events, I think it would be attended with many difficulties; and the Plaintiff having, in my opinion, a sufficient case in equity, I see no ground for exposing him to difficulties at law.

Circumstances in which insurance companies preparing and issuing policies not in conformity with the agreement upon which the insurance was accepted, may be liable in equity on the ground of fraud.

In dealing with this case I have abstained from entering into the question of fraud, as I do not believe that any actual fraud was intended; but, in having taken this course, I must not be understood to give any countenance to the notion that insurance companies, preparing and issuing policies under such circumstances as occur in the present case, would not be held liable in equity on the ground of fraud. The case of fraud is more strong for the interference of the Court than the case of mistake. Lord Eldon, in *Ex parte Wright* (a), refers to the distinction in

cases where the duty of perfecting an instrument rests on the party who is to become liable under it; and the distinction is clearly well founded in principle, and I believe supported by authority.

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I have abstained also from entering into the case of collusion; but I certainly must not be understood to express any favourable opinion of the conduct which has been pursued in this case, either by the Defendants or by their legal advisers.

In the result, I am of opinion that an issue or issues must be directed upon the question as to the health of Mrs. Collett at the time when the first proposal was made.

BASSIL v. LISTER.

A PETITION of rehearing.

The testator effected certain policies of insurance on the lives of two of his sons, and by his will in effect directed the premiums on the policies to be paid out of the rents and incomes of his property, and gave the residue of the income to his wife and daughter for their lives; and in case of the marriages of the sons, he directed the policies to be settled for the benefit of their widows and children (a).

The principal question was, whether the directions in the will for the payment of the premiums on the policies of life assurance brought the case within the *Thelluson*

July 22nd,  
23rd, & 28th,  
A direction by will, to pay out of the testator's property the premiums upon a policy of insurance, effected by the testator upon the life of another person, is valid for the whole life insured, and is not an accumulation, by the *Thelluson* Act, (39 & 40 Geo. 3, c. 98), restricted to twenty-one years only.

(a) See *Tidd v. Lister*, 5 Madd. 429, where a question on the administration of the same estate came before Sir J. Leach, V. C.

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 BARNES  
 v.  
 LISTER.

Act (a); and whether, therefore, the payment of the premiums out of the income of the estate ought not to be restricted to the period prescribed by that Act.

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*Argument.*

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Mr. *Bethell*, Mr. *Rolt*, and Mr. *Eddis*, in support of the petition of rehearing, contended, that under the *Thelluson* Act (39 & 40 Geo. 3, c. 98) the direction for the payment of the premiums on the policies, beyond the term of twenty-one years, was void, and that beyond that period the income belonged to the tenant for life. The case was within the statute where it contained either of these two elements:—first, where the enjoyment was postponed for a period of time beyond twenty-one years; or secondly, where accumulation was directly or indirectly prescribed or sought to be obtained for a period beyond twenty-one years. The case might be supposed of a testator directing that a certain annual sum should be placed in a box or place of safety or deposit for upwards of twenty-one years. Such a case would be within the statute, although nothing was derived by way of interest or profit. It was not necessary in fact, that the mode of dealing with the fund, during the period of suspension, should be one of a profitable character. Suppose the case of a testator directing a sum of money to be paid annually, for a period exceeding twenty-one years, to a third party, upon a contract that such third party should, at the end of the period, repay the amount with simple or compound interest, would not such a mode of accumulation be prevented by the statute? If so,—suppose the direction to be, that an annual sum be paid during a like period to a third party, upon a contract that such third party should, at the end of the time, pay to the testator's representatives a certain sum. That was precisely the case now before the Court,—and in principle it was not distinguishable from the previous case which



had been supposed,—that of the repayment of the monies with interest, which was direct accumulation. It was idle to answer, that the enjoyment of the income was not postponed, because the Insurance Company had the benefit of the annual payment. The same answer might be given, if the money were directed to be laid out in the Government funds from time to time,—the money was then paid for the purchase of the stock, and somebody had the use of the money which was laid out. A testator might direct the application of a fund in the insurance of the lives of his children and grandchildren,—he might multiply the number of lives to be insured, and thus postpone the enjoyment by any object of the gift for eighty or ninety years. This mode of accumulation, it was true, might not be so profitable as the direct addition of sum to sum, for a similar period; but it was not the greater or less productiveness of the investment which would make the case obnoxious to the provisions of the statute: *Shaw v. Rhodes* (a), *McDonald v. Bryce* (b), *Eyre v. Marsden* (c), *Curtis v. Luckin* (d), *Elborne v. Goode* (e), *The Corporation of Bridgenorth v. Collins* (f), *Halford v. Stains* (g).

The *Solicitor-General*, Mr. *Stuart*, Mr. *Russell*, Mr. *Bacon*, Mr. *Shapter*, Mr. *Bagshawe*, Mr. *Leach*, Mr. *Hobhouse*, Mr. *Borton*, Mr. *Headlam*, and Mr. *J. Smith*, for other parties.

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BASIL  
v.  
LESTER.  
—  
*Argument.*

VICE-CHANCELLOR :—

The testator in the cause died very many years ago, and this suit being instituted for the administration of his estate, a receiver was appointed; and by the decree in the cause, made in the year 1820, and by several subsequent orders, one of which was made more than twenty years

*Judgment.*

(a) 1 My. & Cr. 135.

(b) 2 Keen, 276.

(c) Id. 564.

(d) 5 Beav. 147.

(e) 14 Sim. 165.

(f) 15 Sim. 538.

(g) 16 Sim. 488.

1851.  
BASSIL  
v.  
LISTER.  
—  
*Judgment.*

after the death of the testator, the receiver has been directed to pay the premiums upon the policies of insurance out of the income. The petition of rehearing, which is presented by an incumbrancer on the life interest of the daughter, the widow being dead, complains of the decree and orders in respect of those directions.

Several points were argued upon the rehearing. It was contended, on the part of the Petitioner, that the orders were erroneous, because the provisions of the will for keeping up the policies were in contravention of the stat. 39 & 40 Geo. 3, c. 98, commonly called the *Thelluson* Act; and that the case did not fall within the exception of the Act as to portions. And on the part of the Respondents, these positions were controverted; and it was further insisted, that, even if the provisions of the will were void as to the premiums on the policies, the Petitioner, as assignee of the life interest of the daughter, was not entitled to the resulting benefit; and that a petition of rehearing for error apparent could not be presented after the lapse of twenty years. My opinion being unfavourable to the Petitioner upon the question, whether the directions of the will contravene the provisions of the statute in question, it is unnecessary to determine the other points which have been argued, and I therefore abstain from giving any opinion upon them.

The dry question I propose to determine is, whether a direction given by a will, to pay out of the income of the testator's property the premiums upon a policy of insurance, effected by the testator upon the life of another person, is valid, for the whole of the life insured, or only for the term of twenty-one years after the death of the testator. The question depends wholly upon the statute, for there is no doubt that at common law the direction would have been perfectly good, a circumstance not to be disre-

garded in construing the statute, although not, I think, too much to be relied on,—as the Court, I apprehend, in putting a construction upon the statute, must have regard not merely to the pre-existing state of the law, but to the evil which had arisen from it, and which the statute was intended to remedy. Bearing in mind these views, it is necessary, I think, in order to arrive at a sound conclusion upon the present question, to consider the statute with reference to its origin, its enactments, and its spirit and intent.

1851.  
BASIL  
v.  
LUTHER.  
Judgment.

With reference to the origin of the statute, we are fortunately in no difficulty. The law, as it stood before the statute, having put no restriction upon the accumulation of property, so long as the vesting could be suspended, Mr. *Thelluson* had by his will directed his personal property to be invested in land, and the rents and profits of the land to be purchased and of his real estate to be accumulated during the lives of all his descendants who should be living at the time of his death; and then limited the accumulated property in favour of certain of his descendants who might be then living; and this disposition being upheld by the Courts, it was deemed necessary by the legislature to interpose for the purpose of restricting such dispositions for the future: we have here, therefore, the key to the statute. It had its origin in dispositions for the accumulation of rents and profits *quæ* rents and profits, and not in dispositions having any reference whatever to any bargains or contracts entered into for other purposes than the mere purpose of accumulation. What, then, are the enactments of the statute? It is enacted, "that no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise soever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or

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BASSIL  
v.  
LESTER.  
—  
*Judgment.*

lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, deviser, or testator, or during the minority or respective minorities of any person or persons who shall be living, or in ventre sa mere, at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurance directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed, otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property, so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed." By the 2nd section it is provided, "that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler, or deviser, or other person or persons, or to any provision for raising portions for any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed."

It was said in argument that the payment of the income to the Insurance Company in the present case was of itself an accumulation; that the Company are recipients of the income for the purpose of accumulation; that what was done was the same thing as if the rents were paid to an individual, to accumulate in his hands, and to be paid over

at the death of the life insured; and the case was presented to the Court in many similar points of view: but I do not see how the payment of the premiums to the Insurance Company out of the income is an accumulation of the income. The premiums when paid to the Insurance Company become part of their general funds, subject to all their expenses; and although it is true that the funds in the hands of the Companies do generally produce accumulations, it is impossible to say what accumulations arise from any particular premium.

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 v.  
 LISTER.  
 —  
*Judgment.*

It was said that it was an accumulation as to the estate, because the estate receives back a certain sum upon the death of the party whose life was insured; but what the estate receives back is not the accumulation of the income, but a sum payable by the office by contract with the testator; and is this an accumulation within the meaning of the statute? The history of the statute goes far to shew that it is not; and I think the language of the enactment confirms that view.

The enactment is, that no person shall settle or dispose of real or personal estate so and in such manner as that the rents, profits, income, or produce shall be accumulated beyond the prescribed periods; and these are words which admit of a clear, plain, common sense interpretation, as referring to the accumulation of rents, profits, and income, *quà* rents, profits, and income. Why is the Court to put a strained construction upon them, and cut down the undoubted right which existed before the statute, beyond what the language of the statute, in its ordinary interpretation, imports? It is said, that the Court ought to do so, because the spirit and intent of the statute was to prevent accumulations and the suspension of the beneficial enjoyment; but this argument appears to me to beg the ques-

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v.

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*Judgment.*

tion; for it assumes that what the Petitioner here calls an accumulation, suspending the beneficial enjoyment, was an accumulation intended to be prevented by the statute.

Much reliance was placed in the argument upon the mischief which might ensue from policies of insurance being resorted to for the purpose of evading the statute, if the dispositions of this will were upheld; but I entertain no apprehension of any such mischief. I think that settlors and testators who contemplate accumulations are far too keen sighted to incur the risks to which such a course of proceeding would be exposed. On the other hand, I see enormous mischiefs which would arise from the construction for which the Petitioner contends. The case before us is but one instance of the difficulties to which such a construction would lead. If it be supported, what is to become of partnership agreements for long terms of years, where certain sums are to be drawn out annually, and the remaining profits are to accumulate and be divided at the end of the terms? What is to be done with policies of insurance on the lives of debtors? And how is the case put by *Mr. Hobhouse*, of a settlement of policies of insurance, with stock transferred in trust to pay premiums out of the dividends, to be dealt with?

The absence of any provision in the Act for these and many other such cases which might be put, leads strongly to the conclusion that such cases were not intended to fall within the Act; and having regard both to the origin of the enactments and the spirit of the Act, I am of opinion that the case of the Petitioner wholly fails, and that this petition of rehearing must be dismissed with costs.

1851.

IN THE MATTER OF STRACHAN'S ESTATE, AND OF THE  
METROPOLITAN IMPROVEMENT ACTS.

May 29th &  
30th.

**T**HE petition was presented by *Ann Strachan*, the tenant for life, under the will of *William Strachan*, of certain premises in *Wheeler-street, Spitalfields*, which were taken by the Commissioners of Woods &c., under the stat. 9 & 10 Vict. c. 34, for enabling the said Commissioners to construct a new street from *Spitalfields* to *Shoreditch*. The petition prayed for the investment of the purchase-money which had been paid into the Bank, the payment of the dividends to the Petitioner during her life, and for the payment of the costs of the Petitioner, and in particular the bill of costs of her solicitor in respect of the sale and the deduction and proof of her title.

The costs incurred by a tenant for life, in making out the title to property taken by the Commissioners of Woods &c., under the Metropolitan Improvement Acts, are not, upon the construction of section 49 of the Act 3 & 4 Vict. c. 87, within the description of "expenses of the purchases," payable by the Commissioners.

The right of the Petitioner to the costs depended on the 49th section of the stat. 3 & 4 Vict. c. 87, which was referred to by the later Act, and which provided, that where, by reason of any disability or incapacity of the person or persons entitled to any houses, &c., to be purchased or taken under the authority of the Act, the purchase-money should be required to be paid into the Bank in the name &c. of the Accountant-General, and to be applied in the purchase of other land, &c., to be settled to the like uses, in pursuance of that Act,—it should be "lawful for the said Court to order the expenses of all purchases from time to time to be made in pursuance of this Act, or so much of such expenses as the said Court shall deem reasonable, to be paid by the said Commissioners; who shall from time to time pay such sum or sums of money out of the monies applicable to the purposes of this Act as the said Court shall direct."

The Court has no jurisdiction, under the Metropolitan Improvement Acts, to apportion the costs of a tenant for life in making out his title to property taken under those Acts between such tenant for life and the parties entitled in remainder, or to order payment of such costs out of the corpus of the purchase-money which is paid into Court owing to the disability or incapacity of the parties entitled.

Mr. *F. J. Wood*, for the Petitioner, asked for the order

*Argument.*

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—  
*Argument.*

as to costs, according to the prayer; or, if any portion of the costs should not be ordered to be paid by the Commissioners of Woods &c., then that such part of the costs might be paid out of the corpus of the purchase-money, and that the residue might be invested. He cited an unreported case, in which an order for the payment of the expenses incurred by the tenant for life out of the corpus of the fund had been made by the late *Vice-Chancellor of England*.

Mr. W. M. James, for the Commissioners of Woods &c., objected to the order sought as against them, so far as it related to the costs of the Petitioner in respect of the sale and in making out her title; and referred to the construction of the early Railway Acts on that point.

*Judgment.*

VICE-CHANCELLOR:—

I cannot order that the Petitioner's costs of the sale be paid by the Commissioners. I doubt very much whether I have power under the Act to make the order, which has been suggested, for the payment of those costs out of the corpus of the fund. I do not think the Act enables me to administer any equities between the parties. I am sensible of the hardship of the case as respects the tenant for life; and I will endeavour to ascertain whether the practice of the other Judges of the Court is to relieve the tenant for life from any portion of the costs which are not borne by the parties taking the land.

*May 30th.*

VICE-CHANCELLOR:—

I am informed by the Registrars that the practice is always to make the order for the payment of the costs according to the terms of the Act of Parliament. I have



also referred to the authorities; and it appears to me, that the case of *Mitchell v. Newell* (a), in which the Court refused to depart from the literal construction of the Act, is exactly in point. In *Ex parte Cooke* (b) a petition was presented by the tenant for life of lands taken by a Railway Company, praying the interim investment in the funds of the purchase-money which had been paid into Court by the Company. By the terms of the Act in that case, the Court had power to order the expenses of "all purchases" made in pursuance of the Act to be paid by the Company; and it was there held, that the Court had no power to order the payment of the costs of that investment. It was considered that the subsequent Railway Acts had put a statutory construction upon the words referring to the expenses of purchases used in the former Acts, by the insertion of a clause in the subsequent Acts, directing the costs of such interim investments to be borne by the Company. So in *Ex parte Molyneux* (c), the Vice-Chancellor *Knight Bruce* reluctantly declined to make any order as to the costs of an application by the vendors, to have payment out of Court of part of the purchase-money paid in by the *Liverpool and Manchester Railway Company*, and for the investment of the remainder. He was of opinion that he was bound by the terms of the Act as they had been construed by this Court in a series of cases.

In *Ex parte Cooke* the Court said, that the costs in question in that case must be borne by the tenant for life; this was in effect a decision that they were not to be charged upon the capital of the fund. The principle of these decisions is, that the Court has no power except that which it derives from the Act of Parliament; and the Act has not given the Court jurisdiction, upon petition, to apportion or otherwise deal with the costs as between the tenant for life and the remainder-man.

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*In re*  
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IMPROVEMENT  
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*Judgment.*

(a) 3 Railw. Cas. 515.      (b) *Id.* 135.      (c) 2 Coll. 273.

1851.

July 3rd, 8th,  
9th, & 28th.

*B.* became the purchaser of premises at an auction, declaring himself the agent of *C.* in *C.*'s presence; but the vendors' solicitor required *B.* to sign the agreement, and declined to substitute the name of *C.* Communications afterwards took place between the vendors' solicitor and *C.*, with reference to the title. The vendors afterwards brought their bill against *B.* and *C.* for specific performance of the contract:—

*Held*, that, supposing *B.* to be the agent of *C.*, yet the signature of *B.* to the contract made him personally liable to perform it.

That the communication between the vendors' solicitor and the solicitor of *C.* with reference to

the title, was not an adoption of *C.* as the purchaser in the place of *B.*, but should be assumed to be made in furtherance of the original contract, in which, according to *B.*'s representation, he was (as between himself and *C.*) only a formal party.

That the bill of the vendors having been dismissed against *C.*, at his instance, *C.* would not be allowed to set up, in a suit by *B.* against himself, that the decree against *B.* in the suit of the vendors had been improperly obtained in his absence.

That the acceptance of the title by *C.* in such communications would not be binding upon *B.*, for such acceptance would be regarded as having been made in *C.*'s own right, as claiming through *B.*, and not as agent for *B.*

A party claiming an interest in a purchase by virtue of a contract, as having been entered into on his behalf, is a proper party to a suit by the vendor for the specific performance of the contract; otherwise, if he claim merely as a sub-purchaser—*Semble*.

### CHADWICK v. MADEN.

THE bill was filed by the Plaintiffs, as vendors, against *Henry Maden* and *Robert Lees*, for the specific performance of an agreement for the purchase of an estate. The estate in question was put up to sale by public auction on the 4th of October, 1848, and the Defendant *Maden* was the highest bidder, and was declared the purchaser at the auction. Soon after the auction he signed the agreement of purchase, and also signed a memorandum written at the foot of a duplicate of the agreement, purporting to acknowledge that in making the purchase he acted as a trustee for the Defendant *Lees*. *Lees* was present and paid the deposit. The communications with reference to the title were for a short time carried on by the vendors' solicitors with *Mr. Read*, a solicitor, as to whom it was disputed by which of the Defendants he was employed; but after a short time the investigation of the title was taken up by another solicitor, *Mr. Hayworth*, who was employed by *Lees* only, and with whom alone the vendors' solicitors communicated.

The Defendants differed very materially in their statements in relation to the purchase. The Defendant *Maden* by his answer stated, that he had bid and became the purchaser merely as the agent of *Lees*; and the Defendant *Lees*, on the other hand, wholly denied the agency of *Maden*, and stated, that, after *Maden* had become the purchaser,

he agreed to purchase from him at a less price than he had given, provided he was satisfied as to the title.

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CHADWICK  
v.  
MADEN.  
Argument.

Mr. Rolt and Mr. W. M. James for the Plaintiffs.

Mr. Bethell and Mr. Pitman, for the Defendant *Maden*, contended that he was in the situation of a party who had declared that he was dealing only as agent, and was therefore not personally answerable: *Ex parte Hartop* (a), *Johnson v. Ogilby* (b). The discussion as to the title with the solicitors of *Lees* had amounted to a discharge of *Maden*, and an adoption of *Lees*: *Maclean v. Dunn* (c). The fact of the agency might not appear on the contract, but it was a fact which admitted of parol proof: *Wilson v. Hart* (d).

Mr. Bacon and Mr. Osborne, for the Defendant *Lees*, contended that *Lees* was not a necessary party to the suit. *Lees* entered into no contract with the Plaintiffs, he had treated only with *Maden*: *Tasker v. Small* (e).

The cases of ——— v. *Walford* (f) and *Taylor v. Salmon* (g) were also cited.

VICE-CHANCELLOR:—

July 28th.  
Judgment.

In this case each of the Defendants has insisted, that the bill ought, as against him, to be dismissed. The Defendant *Lees* contended, that it should be dismissed against him upon the ground that there was no contract between him and the Plaintiffs; and I think the bill must be dismissed against this Defendant upon that ground. The

(a) 12 Ves. 352.

(b) 3 P. Wms. 279.

(c) 4 Bing. 722.

(d) 1 J. B. Moore, 45.

(e) 6 Sim. 633; S. C., 3 My. & Cr. 63.

(f) 4 Russ. 372.

(g) 4 My. & Cr. 134.

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CHADWICK  
v.  
MADEN.  
—  
Judgment.

Defendant repudiating any trust in *Maden* for his benefit, the Court cannot in this suit determine the question, whether such a trust exists or not. If *Maden* be compelled to perform the contract, he must seek his remedy against *Lees* in another suit; and the dismissal of this suit as against *Lees* will not affect that remedy; for the question between *Maden* and *Lees* will be, not whether *Maden* was bound to perform the agreement, but whether, having been compelled to perform it, he is entitled to be indemnified by *Lees*; and *Lees*, having insisted on being dismissed from this suit, could not be allowed to set up against *Maden* that the proceedings were improperly had in his absence. But, although I think the bill must be dismissed against *Lees*, I think it must be dismissed against him without costs, for the evidence clearly proves that the memorandum signed by *Maden* was signed in his presence; and there being no proof on his part that he at any time communicated to the Plaintiffs the parol contract with *Maden*, which he now sets up, if in truth it ever existed, his conduct throughout must have led the Plaintiffs to believe that he claimed under the contract; and I am of opinion, that, if he had claimed under the contract, he would have been a proper party to the suit.

The Defendant *Maden* contended, that the bill should be dismissed as against him upon three distinct grounds: first, that the case made by the bill was not the case of purchase by him alone; secondly, that he bought, and was known by the Plaintiffs to have bought, merely as the agent of *Lees*; and thirdly, that if he was ever liable on the contract, the Plaintiffs have discharged him from the liability by adopting *Lees* as the purchaser. But I am of opinion that the case of the Defendant *Maden* cannot be maintained upon any of these grounds.

As to the first, the bill distinctly alleges that *Maden* be-

came the purchaser at the auction, and signed the agreement, and that *Lees* claims an interest in the contract under some agreement entered into with *Maden*; and it does not appear to me that the next allegation, which was most relied on in the argument on this point,—that, in fact, *Maden* entered into the agreement as well on behalf of *Lees* as of himself,—is inconsistent with *Maden's* being the sole purchaser, as it may well be that he alone purchased from the Plaintiffs, though he made the purchase on his own as well as on *Lees'* behalf; and the succeeding allegation proves that this was intended by the bill; for it is that *Maden* has by writing declared himself to be a trustee for *Lees* in respect of some interest in the contract; and in addition to this, the bill charges that the Plaintiffs have never been parties to any substitution of *Lees* for *Maden*, and that *Maden* is the person liable under the contract.

As to the second ground, it no doubt appears that *Maden* immediately after the auction represented *Lees* to be the purchaser, and therefore himself to be an agent merely; but it distinctly appears by the evidence that the Plaintiffs' solicitor, on being requested to insert the name of *Lees* in the agreement as the purchaser, declined to do so, and insisted on retaining *Maden* as the purchaser, and drew up the agreement of purchase in his name accordingly; and that *Maden* then signed the agreement: and I think that, assuming *Maden* to have been an agent merely, and independent of the fact of his having become the purchaser at the auction, the signature of the agreement was sufficient to subject him to the liability of performing it, it being clear that an agent may become liable upon his own undertaking.

As to the third point insisted upon in *Maden's* behalf: I think that, in point of fact, the communications upon the title have, at all events since Mr. *Hayworth* was concerned,

1851.  
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 v.  
 MADEN.  
 Judgment.

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v.  
MADEN.  
Judgment.

been had with him as the solicitor of *Lees*; but I am of opinion that *Maden* is not thereby discharged from the contract; for *Maden* signed the memorandum to which I have referred at the very time when he signed the agreement, and thereby and otherwise represented to the Plaintiffs that *Lees* was entitled, through him, to the benefit of the contract. And in this state of circumstances, I think the communications had with *Lees* must be taken to have been had in furtherance of the original contract, and not upon any new or substituted contract. *Maden*, as between himself and the Plaintiffs, had represented himself to be placed in the position of a formal party; and he cannot, I think, claim to be discharged upon the ground that the Plaintiffs so treated him. I think, therefore, there must be a decree against *Maden* for specific performance.

It was argued on the part of the Plaintiffs that *Lees* had accepted the title, and that the decree therefore ought to proceed upon that footing: but it is one thing to hold that *Maden* is not discharged by the dealings with *Lees*, and another, that he is bound by all that was done by *Lees* in the course of those dealings. I think that the communications had with *Lees* upon the title were had with him in his own right as claiming through *Maden*, and not as the agent of *Maden*; and that *Maden*, therefore, is not bound by any acceptance of the title by *Lees*, if he in fact accepted it, as to which I entertain some doubt. There must, therefore, be the usual reference as to title.

Another point which was raised on the part of the Plaintiffs was, as to some machinery which was to be taken by the purchaser at a valuation, to be made by two arbitrators, to be nominated, one by the vendors, and the other by the purchaser, or, upon the purchaser's default, by the vendors; and in case the arbitrators did not agree, by an umpire to be appointed by them. Notice having

been given to *Maden* to name an arbitrator to value this machinery, he omitted to do so, and therefore the Plaintiffs, the vendors, named an arbitrator for him; and the arbitrators having named an umpire, and not having agreed in their valuation, the machinery was valued by the umpire. The question was, whether *Maden* ought to be held bound by this valuation; and I think that he ought not. It was made at a time when the Plaintiffs were in treaty with *Lees*, and when *Maden* might well expect that the contract would be performed by him.

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CHADWICK  
v.  
MADEN.  
—  
Judgment.

WILKINSON v. FOWKES.

July 15th,  
24th, 26th, &  
29th.

THE bill was brought by the son and heir-at-law of *Mary Wilkinson*, who was the widow and devisee of *Matthew Wilkinson*, for the purpose of setting aside the conveyance of a freehold estate made by *Matthew Wilkinson* to the defendant. The bill alleged, that the conveyance was obtained by fraud, and that the consideration expressed to have been paid for the same, had never, in fact, been paid; and it prayed a declaration, that a paper writing, signed with the mark of *Matthew Wilkinson*, and also certain inden-

A supplemental suit grafts into the original suit the new parties brought before the Court by the supplemental suit, and enables the Court to deal with the parties to both records, as if they were all parties to the same record.

A Defendant to an original suit is not to be made a party to a supplemental suit, on the mere ground of a right to question the representative character of a Defendant to the supplemental suit; for his title to sustain that character cannot be tried in this Court.

The original Defendants are necessary parties to a supplemental bill, where the supplemental suit is occasioned by an alteration after the original bill is filed, affecting the rights and interests of the original Defendants as represented on the record; but they are not necessary parties to a supplemental bill, where there may be a decree upon the supplemental matter against the new Defendants, unless the decree will affect the interests of the original Defendants; nor are they necessary parties, where the supplemental bill is brought merely to introduce formal parties.

To a bill filed by the heir to set aside a purchase from his ancestor, on the ground of fraud, stating, also, that the purchase-money, or alleged consideration, was not paid,—the personal representative of the ancestor, having an interest in the question whether the contract is valid or not, is a necessary party; and if such personal representative be brought before the Court by supplemental bill, the original Defendant should be made a party to such supplemental bill.

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*Statement.*

tures of lease and release, marked, sealed, and delivered by him, were obtained by fraud, and ought to be set aside; and that the defendant *Fowkes* might be decreed to deliver up the same to the Plaintiff, together with all other the title deeds entrusted by *Matthew Wilkinson* to the Defendant, and all other the deeds and writings in the possession of the Defendant, relating to the title of the said freehold hereditaments; and that the said paper writing and indentures, sealed and delivered by *Matthew Wilkinson*, might be cancelled, or otherwise that *Fowkes* might be decreed to reconvey the said freehold hereditaments unto and to the use of the Plaintiff in fee simple, freed from any charge created by the Defendant *Fowkes*.

The answer of *Fowkes* denied the alleged fraud, and insisted that the conveyance was the result of a fair and valid agreement, and that the consideration had been duly paid.

*Argument.*

Mr. *Bethell* for the Plaintiff.

The *Solicitor-General* and Mr. *W. M. James*, for the Defendant, objected, that the personal representative of *Matthew Wilkinson*, the vendor, was a necessary party. The Defendant was entitled to have the suit so framed, that he might be discharged in respect of the matter in question once for all. Now, the bill alleged that the purchase money had not been paid:—if so, and the fraud should not be substantiated, as the defendant had a right, for the purpose of this argument, to assume it would not be, the Defendant would be liable to a further suit by the representative of *Matthew Wilkinson*, for the purchase money which the Plaintiff alleged to be unpaid. The Defendant might insist, that the question, both as to the land and the purchase, should be definitively settled in this suit.



Mr. *Bethell* and Mr. *Kinglake* contra.

The Plaintiff has nothing to do with the personal representative in this suit. No question can in this suit be determined between the real and personal representative. The Defendant alleges, that the purchase money was paid: how, then, can he take an objection founded on the contrary supposition? And if the purchase money had been paid, as the Defendant alleges, the Plaintiff, in setting aside the sale, will submit (as the Court might require) to the repayment to the Defendant of what he shall prove to have been paid.

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 }  
 WILKINSON  
 v.  
 FOWKER.  
 —  
*Argument.*

The VICE-CHANCELLOR allowed the objection.

*Judgment.*  
 —

The personal representative of *Matthew Wilkinson*, who was also the personal representative of his widow and devisee, was brought before the Court by supplemental bill; and the cause again stood for hearing.

*Statement.*  
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The *Solicitor-General* and Mr. *W. M. James* objected, that the suit was still imperfect, inasmuch as the Defendant *Fowkes* was not made a party to the supplemental bill. All parties should be bound by the decree; but if a decree were made in this suit, and a subsequent suit was brought against the defendant by the personal representative of *Wilkinson*, the Defendant could not, in his defence to such a suit, plead the decree made in another suit to which he was not a party. It was not enough to say, that both of the suits would come on to be heard together; that did not give the Defendant in one suit an interest in the other. It was substantially the same as if the Plaintiff had filed two bills, one against each Defendant, and had procured the two suits to be heard together,—could he there-

*Argument.*  
 —

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 v.  
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 —  
*Argument.*

fore say, that a party to one suit must be taken to be a party to the other? The Defendant *Fowkes* had no opportunity of claiming to have his purchase money returned out of the personal estate of *Matthew Wilkinson*, if the Plaintiff should succeed in impeaching the sale. Nor had he any opportunity of ascertaining or contesting the fact of whether the Defendant to the supplemental bill was in truth the personal representative of *Wilkinson*.

Mr. *Follett* appeared for the personal representative of *Matthew Wilkinson*, who, as such personal representative, was the Defendant in the supplemental suit, and submitted to be bound by any decree which the Court might make.

Mr. *Bethell*, Mr. *Rolt*, and Mr. *Kinglake*, for the Plaintiff. —The only ground on which the objection for want of parties had been sustained, was in respect of the interest which the representative of *Wilkinson* had in the purchase-moneys: whether he were the party to receive or pay, he was now present, and would be bound by the decree. The later cases on the subject of making the original Defendants parties to supplemental bills had been the result of modern refinements, arising out of the exercise of a too subtle ingenuity, unknown to the more simple pleading of a previous time. The rule twenty years ago was expressed by Sir *John Leach*, in *Bignall v. Atkins*: "If any purpose of justice requires that the original Defendant should be at liberty to join issue with the Plaintiff on the supplemental facts, then it is fit that he should be made a Defendant (a)." What purpose of justice in this case required that the original Defendant should be a party to the supplemental bill? That bill was tied on, as it were, and made one with the original cause, and had all the effect, as

(a) 6 Madd. 371.

to concluding the rights of the parties and otherwise, as if the Defendants were parties to the same bill

Most of the cases mentioned in the judgment, and also *Lyne v. Pennell* (a), were cited.

1861.  
WILKINSON  
v.  
FOWKES.  
—  
*Argument.*

VICE-CHANCELLOR:—

In this case an objection was raised to the cause being heard, upon the ground that the original Defendant had not been a party to a supplemental bill; and the question was much argued, in what cases original Defendants were necessary parties to supplemental suits. I have thought it right, therefore, to examine the authorities upon the subject. The earliest case is, I believe, *Jones v. Jones* (b), where Lord *Hardwicke*, after some observations which seem to refer to the particular circumstances of that case, and to the period at which the objection may be taken, states his opinion, that the original Defendants are not necessary parties to a supplemental bill merely introducing formal parties. Lord *Redesdale*, in his Treatise on Pleading, referring to this case (c), which, from his well-known accuracy, I have no doubt he had examined with the Registrar's Book, deduces from it more general rules: First, that where an event occurs after the filing of the original bill, and there is a consequent alteration with respect to the parties in general, the Defendants to the original suit must be parties to the supplemental suit; the reason assigned being, that the supplemental suit must be heard with the original suit; or, if the original suit has been heard, then upon the supplemental matter (d). From which reason I think it is to be collected, that what he means by

*Judgment.*  
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(a) 1 Sim., N. S., 113.

(b) 3 Atk. 217.

(c) Vide p. 69, 2nd edit.; p. 58, 3rd edit.; and p. 75, 4th (Mr. Jeremy's) edit., in which the origi-

nal references are altered, and cases are referred to, which have no bearing on the subject.

(d) Tr. Pl., p. 69, 2nd edit.; p. 59, 3rd edit.

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 ———  
*Judgment.*

a consequent alteration with respect to the parties, is any alteration which may affect the rights or interests of the original Defendants, as represented on the record. Why is the cause to be heard as to them, unless their interests may be affected by the alteration which has taken place? Secondly, Lord *Redesdale* says, that the original Defendants need not be made parties to the supplemental suit, where there may be a decree upon the supplemental matter against the new Defendants, unless the decree will affect the interests of the original Defendants (*a*); and thirdly, he adopts Lord *Hardwicke's* proposition as to formal Defendants (*b*).

The question seems to have rested thus on Lord *Redesdale's* authority, till we come to the decisions of Sir *J. Leach* in *Bignall v. Atkins* (*c*), and of the late Vice-Chancellor of *England* in *Greenwood v. Atkinson* (*d*); and neither of these cases seems to me to have altered the law of the Court as laid down by Lord *Redesdale*. In both of them the original Defendant had already set up the case he insisted upon against the new Defendant, whom he required to be made a party; and neither of them, therefore, fell within Lord *Redesdale's* first class of cases. It is to observed, however, as to those cases, that each of them, and, as I apprehend, most correctly, adopts the principle that the supplemental suit grafts the new parties into the original suit, and enables the Court to deal with the parties to both records as if they were all parties to the same record; and, further, that *Bignall v. Atkins* wholly negatives the idea that a Defendant to the original suit can require to be made a party to the supplemental suit, upon the ground of a right to question the representative character of the new Defendant, an idea for which I apprehend there

(*a*) Tr. Pl., p. 70, 2nd edit.; p.  
 50, 3rd edit.  
 (*b*) *Ib*.

(*c*) 6 Madd. 369.  
 (*d*) 5 Sim. 419.

can be no foundation, as the title cannot be tried in this Court.

1851.  
 WILKINSON  
 v.  
 FOWKES.  
 Judgment.

The next case was, I believe, *Feary v. Stephenson* (a), before Lord *Langdale*, a case in which his Lordship, whether correctly or not is not material to consider, went upon the ground that the interests of accounting Defendants might be materially affected by a change in the parties by whom they were called to account; and the case thus fell within Lord *Redesdale's* first class of cases, and required the original Defendants to be made parties to the supplemental suit. *Feary v. Stephenson* has been succeeded by the series of cases cited from Mr. *Hare's* Reports: *Dyson v. Morris* (b), *Jones v. Howells* (c), and *Holland v. Baker* (d); to which may be added, *Parker v. Carter* (e), and *Parker v. Parker* (f); in some of which cases the original Defendants were required to be made Defendants to the supplemental suit, and in others not. They were not required to be made parties to the supplemental suit in *Dyson v. Morris* or in *Parker v. Carter*, because their rights and interests, as represented on the record, remained the same as before; and the graft of the parties into the original suit by the supplemental suit, enabled those rights and interests to be worked out. They were required to be parties in the other cases, because their rights and interests might be affected by the alteration which had taken place. Different reasons are assigned in these cases for the different decisions; but, in substance, the question in all of them has been, whether the alteration in the record affected the position or the interests of the original Defendants. The language of Lord *Redesdale* has been varied; but his distinctions do not appear to me to have been shaken. By those distinctions I shall abide

(a) 1 Beav. 42.

(b) 1 Hare, 413.

(c) 2 Id. 342.

(d) 3 Hare, 68.

(e) 4 Id. 406.

(f) 9 Beav. 144.

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WILKINSON

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*Judgment.*

in deciding the present case, believing that the attempt to lay down more definite rules upon a matter which must in all cases be governed by circumstances, varying in each particular case, only lead to increased confusion.

Adopting, then, Lord *Redesdale's* positions, I have to consider whether, in this particular case, the interests of the original Defendant can be affected by the alteration introduced by the supplemental bill. Now the original bill is filed by an heir against the Defendant as purchaser from his ancestor, for the purpose of setting aside his contract and deeds of purchase. At the hearing, it was objected, that the personal representative of the ancestor was a necessary party to the suit; and I held the objection to be good, as the bill alleged the purchase-money to be in part unpaid; and I therefore considered that the personal representative had an interest in the question, whether the contract was good or not. The objection having been allowed, the supplemental bill has been filed by the heir against the personal representative only; the purchaser, therefore, has no opportunity of raising any question between himself and the personal representative which may not have been raised in the original suit. His interest, therefore, may be affected if the nature of the suit admits of any such question being raised. It will not, indeed, be affected if this bill be dismissed; but if the transaction be set aside, may not the purchaser have rights to insist upon against the personal representative, which may be preliminary to any decree against him. May he not have rights against the Plaintiff himself which could not be set up in the absence of the personal representative. I think that he may, or, at all events, that he is entitled to state the grounds on which he contends that he may; and, therefore, though most reluctantly, I feel myself compelled to allow this objection.

I would gladly have acted on the offer made on the part of the personal representative, to submit to any decree which might be thought proper; but I think the state of the authorities precludes me from doing so; for, on referring in my copy of the Reports to the case of *Jones v. Howells* (a), in which the same offer was made, I find a note against it, that it was affirmed by the Lord Chancellor.

(a) 2 Hare, 346.

1851.  
WILKINSON  
v.  
FOWKES.  
Judgment.

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GREENWAY v. BROMFIELD.  
HANDLEY v. WOOD.

August 2nd  
& 6th.

THE bill in the first cause was filed in March, 1840, by judgment creditors of *William Edwards*, to enforce the charges they had acquired by virtue of their judgments, against the interest of the debtor in a real estate in *Warwickshire*. The estate was subject to several charges prior to the interest of the debtor, and, among others, to a sum of 5000*l.*, appointed by the will of *John Edwards*, the father of the debtor, in execution of a power for that purpose. *John Edwards* died in October, 1835. A receiver of the estate was appointed in the first cause, in April, 1840, and a decree was made in March, 1842, referring it to the Master, among other things, to inquire and state what charges and incumbrances there were upon or affecting the estate in question.

On a bill to enforce a charge acquired by a judgment creditor on the estate of the debtor, a receiver was appointed, and, at the hearing, a reference as to incumbrances on the estate was directed. A state of facts and claim carried in before the Master under such inquiry by an incumbrancer, not a party to the suit, was held to take the charge as to the interest out of the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 42); and the incumbrancer was held to be entitled to arrears of interest for six years antecedent to the time of such claim.

The executors of *John Edwards*, who were not parties to the first cause, on the 11th of June, 1845, carried in a state of facts, and claim, under the decree in that cause, for the 5000*l.* and interest, charged on the estate by his will.

The Master by his report, dated in January, 1850, found that the 5000*l.*, with interest thereon at 4*l.* per cent. from

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 {  
 GREENWAY  
 v.  
 BROMFIELD,  
 HANDLEY  
 v.  
 WOOD.  
 —  
*Statement.*

the decease of *John Edwards*, was a charge on the estate.

The bill in the second cause was filed in May, 1851, by the executors of *John Edwards*, for the purpose of enforcing the charge of 5000*l.*, and interest, on the estate.

Upon a petition presented by the Plaintiffs in the first cause, and intituled in both causes, for the distribution of the fund paid into Court by the receiver, and the produce of a portion of the estate taken by a Railway Company, the question arose, as to the period from which the arrears of interest on the charge of 5000*l.* should be calculated.

*Argument.*

Mr. *Schomberg*, for the executors of *John Edwards*, contended, that the arrears should be allowed, either from the death of *John Edwards*, when the charge accrued, or at least from six years prior to the carrying of the state of facts into the Master's office. He cited *Hunter v. Nockolds (a)*.

Mr. *J. Russell*, Mr. *Bacon*, Mr. *Wright*, Mr. *Metcalf*, and Mr. *Smale*, for other parties, relied on the 42nd section of the stat. 3 & 4 Will. 4, c. 27, by which the land was exempted from arrears of rent or other charges for more than six years: *Hunter v. Nockolds (b)* differing from *Du Vigier v. Lee (c)*; and contended that the proceedings before the Master would not take the case out of the statute: *Harrisson v. Duignan (d)*.

(a) 1 Mac. & G. 654; S. C., 1 H. & T. 644.

H. & T. 651.

(c) 2 Hare, 326.

(b) 1 Mac. & G. 640; S. C., 1

(d) 2 D. & War. 295.



VICE-CHANCELLOR:—

The question upon this petition was, whether the executors of *John Edwards* were entitled to have the interest upon a sum of 5000*l.*, charged upon estates affected by the suit, paid out of a fund in Court, which had arisen from rents and profits of the estates got in by a receiver appointed in the cause; and, if so, from what period the interest was to be computed.

1861.  
 GREENWAY  
 v.  
 BROMFIELD.  
 HANDLEY  
 v.  
 WOOD.  
 Judgment.

The Plaintiffs in the suit being judgment creditors, obtained the appointment of the receiver in the year 1840; and by the decree, in 1842, it was referred to the Master to inquire as to charges and incumbrances upon the estate. The parties entitled to the 5000*l.* carried in a charge before the Master in June, 1845, and the report has found the 5000*l.* to be due, with interest from the death of *John Edwards*, on the 5th of October, 1835.

It was argued in opposition to the claim, that no interest, or at all events no interest for a period exceeding six years from the present time, was payable out of the rents; and *Harrison v. Duignan* (a) was cited upon the point: but in *Harrison v. Duignan* the party entitled to the charge had been no party to the report which found the charge, and had carried in no claim under the order on which the report was founded; and the case goes no further than that a report of an infant's maintenance, in which the Master upon the inquiry as to the infant's portion finds a charge upon the infant's estate, and which is followed by the appointment of a receiver, will not take the charge out of the Statute of Limitations as to interest, a point on which I should have thought there could have been no doubt. In the present case, however, I think that the interest, from whatever period it may run, must be paid

(a) 2 D. & War. 295.

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WOOD.

*Judgment.*

out of the rents; for the Court on further directions could never have parted with the rents without satisfying the interest on the charge.

The question then is, from what period the interest is to be computed? And I am of opinion, upon the authorities, that it must be computed from six years antecedent to the claim carried in before the Master. The case upon this point appears to me to be entirely governed by *Hunter v. Nockolds* (a) and by *Henry v. Smith* (b), in which Sir *Edward Sugden* arrived at the same conclusion as was arrived at by Lord *Cottenham* in *Hunter v. Nockolds*.

(a) 1 Mac. &amp; G. 654; S. C., 1 H. &amp; T. 651.

(b) 2 D. &amp; War. 381.

July 12th.

## WILKINSON v. WILKINSON.

A petition in lunacy, after the death of the lunatic, by his committee, and a reference to the Master thereon, followed by a report, finding that a sum of money had been expended by the committee in the maintenance of the lunatic, is not a proceeding which will take the claim of the committee out of the Statute of Limitations, as against the heir-at-law of the lunatic, who was not a party to the application.

A CLAIM for a sum of 745*l.* 18*s.* 11*d.*, alleged to have been expended in the maintenance of *E. P. Wilkinson*, a lunatic, by the Plaintiff, who was his committee. The lunatic died in 1843, and the Defendants were the administrator of his personal estate and his heiress at law. In May, 1844, after the death of the lunatic, a petition had been presented by the present Plaintiff in the lunacy, upon which a reference had been directed, to inquire what sums had been expended by the Plaintiff, for the maintenance of the lunatic, beyond an allowance of 100*l.*, which had been paid by the receiver in a cause, out of the property to which the lunatic was entitled. The report was made on the 21st of December, 1844, finding that the sum now claimed had been so expended. The claim was filed on the 22nd of July, 1850. The report and the Plaintiff's affidavit were the only evidence tendered of the debt. The heiress at law filed an affidavit, stating only, that she insisted upon the Statute of Limitations as a defence to the claim.

Mr. *Malins*, for the Plaintiff, submitted that the time should run only from the date of the report.

Mr. *Willcock*, for the personal representative of the lunatic, did not object to the order sought by the claim.

Mr. *Selwyn*, for the heiress at law, submitted, that the report was entirely ex parte, so far as related to the real representative, and was not in any respect binding upon her; and that, even if it had been, the petition and report in the lunacy could have no effect in keeping alive the demand.

1851.  
 WILKINSON  
 v.  
 WILKINSON.  
 Argument.

The VICE-CHANCELLOR said, that the petition and report in the lunacy, after the death of the lunatic, could have no effect in binding the estate of the lunatic, or in preventing the operation of the statute. There had been nothing to prevent the claimant from proceeding against the estate of the lunatic immediately after his death, as he had now done. But, independently of the statute, there was not even *prima facie* evidence of the debt as against the real estate. The admission of the executor was no evidence against the heiress at law; and, as against her, the claim must be dismissed with costs.

Judgment.  
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The cases of *Marten v. Whichelo* (a) and *Putnam v. Bates* (b) were referred to.

(a) 1 Cr. & Ph. 257.

(b) 3 Russ. 188.

1851.

July 5th &  
8th.

Equity will not decree the specific performance of a covenant by the mesne landlord with his lessee for the renewal of the lease, after the lessee has wilfully neglected or refused to renew; and the non-payment, after demand, of the fine which the mesne landlord has paid to the superior landlord, amounts to such neglect or refusal.

An under-lessee who is not himself bound to take a renewal of his lease, but who is entitled to the benefit of a covenant by his lessor for the renewal of his under-lease, upon payment of his proportion of the fines and expenses of a renewal by the superior landlord, ought, if he complains of the amount of such proportion required from him by the mesne landlord, to apply without delay to a Court of equity to assess the sum which he ought to pay, submitting himself to the jurisdiction of that Court, to compel him to pay a reasonable sum; and if instead of making such application, and after notice from his mesne landlord that the fine must be paid in a certain time or his right will be excluded, he should delay the payment, the objection that the sum demanded from him was unreasonable, will not excuse his laches.

The time from which the lessee will be deemed to have neglected or refused to renew, is not to be computed from the latest time at which the mesne landlord might have procured a renewal; but from the time at which he applies to the under-lessee to contribute to the fine and expense of the renewal which he is about to obtain, or has obtained.

## CHESTERMAN v. MANN.

BY a lease, dated the 7th of August, 1819, *Mann* demised to *Westmacott* certain tenements in the *Vauxhall Bridge Road*, held under the Dean and Chapter of *St. Peter's, Westminster*, (the same being part of more extensive premises comprised in a lease of the 28th of February, 1814, from the Dean and Chapter to *Rowles*, for forty years from Christmas, 1813, and demised by *Rowles* to *Mann*, by a lease of the 26th of November, 1817, for the residue of the same term wanting three days), for the term of thirty-four and a quarter years wanting six days from Michaelmas, 1819, at a rent of 85*l.* a year; and *Mann* thereby, for himself, his heirs, executors, administrators, and assigns, covenanted with *Westmacott*, his executors, administrators, and assigns, that if *Mann*, his executors or administrators, should obtain from the Dean and Chapter, or their successors, any new lease of the premises thereby demised, or term therein beyond the term he then held, which would expire three days before Christmas-day, 1853, then and in such case *Mann*, his executors or administrators, should and would, on the request of *Westmacott*, his executors, administrators, or assigns, grant and execute unto him or them a new and fresh lease of the same premises, for such further term or number of years as *Mann*, his executors or administrators, might have therein, wanting six days thereof, until the term of seventy-four and three quarters years from Michaelmas, 1819, should have been granted,

the amount of such proportion required from him by the mesne landlord, to apply without delay to a Court of equity to assess the sum which he ought to pay, submitting himself to the jurisdiction of that Court, to compel him to pay a reasonable sum; and if instead of making such application, and after notice from his mesne landlord that the fine must be paid in a certain time or his right will be excluded, he should delay the payment, the objection that the sum demanded from him was unreasonable, will not excuse his laches.

The time from which the lessee will be deemed to have neglected or refused to renew, is not to be computed from the latest time at which the mesne landlord might have procured a renewal; but from the time at which he applies to the under-lessee to contribute to the fine and expense of the renewal which he is about to obtain, or has obtained.

but upon this condition, nevertheless, that *Westmacott*, his executors, administrators, or assigns, should pay and contribute a just and fair proportion of the fines, fees, and expenses, which *Mann*, his executors, administrators, or assigns, should pay or expend in procuring or obtaining such renewal or grant beyond the term which he then had in the same premises, and of any increase of rent reserved in or by such renewed leases, (if any), beyond the rent which he then paid; and that *Westmacott*, his executors, administrators, or assigns, should execute a counterpart of such fresh lease to him or them, in which should be reserved the same rent as was reserved by this lease; and it was thereby declared, that such new lease or leases, and the counterpart thereof, should be prepared by the solicitor of *Mann*, his executors, &c., and paid for by the lessee thereof, and should contain the like covenants as in this lease, except the covenant for renewal, and also such other covenants as might correspond with those in the then existing lease to *Mann*; and it was thereby provided, that nothing therein contained should extend to bind his executors, &c., to renew his then present or any future lease with *Rowles*, nor to obtain an original grant from the Dean and Chapter; but, if he should refuse or neglect so to do, it should be lawful for *Westmacott*, his executors, &c., at any time during the last six months of the term thereby granted, to apply for or obtain a lease of the same premises from *Rowles*, or the Dean and Chapter, discharged from all interest of *Mann*, his executors, &c., therein.

By another lease, dated the 30th of November, 1819, *Mann* demised to *Westmacott* some tenements adjoining those comprised in the demise of August, 1819, and which were also part of the premises comprised in the same original and prior leases, for the term of thirty-four and a quarter years wanting six days, from Michaelmas, 1819, at a rent of 37*l.* a year; and *Mann* thereby entered into a

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 Statement.

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MANN.  
—  
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like covenant for renewal of the term to *Westmacott*, as in the demise of August, 1819.

By an indenture, of the 1st of November, 1842, *Westmacott* assigned the premises comprised in the leases of August and November, 1819, to the Plaintiff *Chesterman*, for the unexpired residues of the said terms, subject to the rents and covenants.

In 1842, *Rowles* and *Mann*, being both dead, the executors of *Mann*, with the concurrence of the executors of *Rowles*, obtained a renewal of the lease of the premises comprised in the two demises of August and November, 1819, by *Westmacott* to *Mann*, and also of other premises. The new lease from the Dean and Chapter to the executors of *Mann* was dated the 24th of July, 1842, and was made in consideration of a fine or foregift of 2900*l.*, and of the surrender of the previous lease, and was for a term of forty years from Christmas, 1841, subject to the rents and covenants therein contained.

A correspondence between the respective solicitors of the Plaintiff and the Defendants, on the subject of the renewal by the latter of the leases of the premises which the Plaintiff had taken from *Westmacott*, commenced in January, 1844. The substance of this correspondence is stated in the judgment.

*Chesterman* filed the bill in August, 1849, against the executors of *Mann*, stating that he did not know of the renewal of the lease by the Dean and Chapter; and that the same was effected by the Defendants at an unusual time, and was concealed from the Plaintiff; and that, when he discovered the same, he applied to the Defendants for a new lease of his portion of the premises, according to the covenant, offering to pay his fair proportion of the fines

and expenses, and requiring such information as would enable him to compute the same; that the Defendants refused to give him any such information; that they afterwards promised to grant him a new lease, and at first demanded 657*l.* as the Plaintiff's proportion of the fines and expenses, and afterwards raised their demand to 1023*l.*, and gave notice that, unless the amount was forthwith paid, they would not grant any new lease to the Plaintiff. The bill alleged, that 657*l.* greatly exceeded the Plaintiff's fair proportion of the fines and expenses; and it prayed that the Defendants might be decreed specifically to perform the covenants contained in the said leases of August and November, 1819; and might be decreed to grant and execute to the Plaintiff a new and fresh lease or new and fresh leases of the said premises, according to the terms of the covenant, the Plaintiff being ready and willing and thereby offering to pay to the Defendants and to contribute a just and fair proportion of such fines, fees, and expenses, and to execute a counterpart or counterparts of such new or fresh lease or leases according to the terms of the covenant.

The answer stated the correspondence. The Defendants said, they had not communicated the renewal to the Plaintiff as they knew nothing of his interest, and he had, in fact, then no interest in the premises. They said that the renewal had not been made at an unusually early time, but, on the contrary, rather later than it ought to have been according to custom; and they relied on their notice to the Plaintiff of the 3rd of December, 1845, and the other facts (adverted to in the judgment), and declined to renew the leases to the Plaintiff.

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Mr. *Malins* and Mr. *Selwyn* for the Plaintiff.—The covenant is in general terms, giving the Plaintiff a right

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at any time to call for a renewal, if his lessor should himself obtain a renewal. There is nothing in the contract which enabled the lessor arbitrarily to fix a time beyond which he would not renew. Even if he might fix a time by a notice, still it could only be accompanied by terms upon which he was entitled to insist. The Defendants should have placed themselves in the position of a party offering to renew for a proper fine, before they could be in a condition to exclude the right of the Plaintiff by imposing an arbitrary period for the exercise of that right. The Defendants, instead of doing this, required an unreasonable sum to be paid by the Plaintiff, a sum which had fluctuated from 657*l.* to 1023*l.* without any explanation of the diversity. The Plaintiff had throughout the correspondence sought in vain to discover the principle upon which the charge was computed. Until the question of the amount of the fine and expenses to be borne by the Plaintiff had been settled, laches could not be attributed to him. But there had, in fact, been no laches; for the basis of the contract between *Mann* and *Westmacott* was, that the time of renewal should be before the expiration of the lease from the Dean and Chapter, and the lease would not expire until 1853. The Defendants had the whole of that time to renew, and the Plaintiff therefore had the same time. The Defendants might, for their own convenience, have anticipated the time of renewal; but they could not thereby accelerate the obligation of the Plaintiff, or deprive him of any portion of the time which the covenant gave him.

*The Solicitor-General* and *Mr. Shadwell*, for the Defendants.—The grounds of defence to the suit are both legal and equitable. The legal ground is, that the Plaintiff's case is one where, being under the reciprocal obligation to perform his own part of the contract, he has come for the aid of the Court to enforce performance by the Defendants,



without averring performance or anything equivalent to performance by himself. The payment of the fine by the Plaintiff and the renewal by the Defendants are concurrent acts, the covenants are dependent on each other. The doctrine is stated in Selwyn's *Nisi Prius*, vol. 1, p. 527, 11th edit. tit. "Concurrent Acts;" and is supported by many authorities: *Glazebrook v. Woodrow* (a), *Heard v. Wadham* (b), *Rubery v. Jervoise* (c). The condition of paying the fine as the title to renewal, is not one which the Plaintiff has an indefinite time to perform; it must be done immediately, viz. in convenient time: Comyn. Dig. tit. "Condition," (G) 5. Regarding the payment of the fine either as a concurrent act or as a condition, the case of the Plaintiff fails. Not only is there the absence of a right in point of law, but the delay of the Plaintiff has disentitled him to any assistance in a Court of equity as against the Defendants. This is equally clear upon the authorities on the question of the right to renewal: *Jackson v. Saunders* (d), *Deane v. Marquis of Waterford* (e); as upon the general principle of the Court in refusing to enforce specific performance where there has been laches: *Heaphy v. Hill* (f), *Carter v. Dean and Chapter of Ely* (g).

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Mr. Selwyn in reply.—The law as to concurrent acts has no application. In order to obtain the benefit of that principle, the Defendants must have been in this position—they must have intimated their intention to renew to the Plaintiff, and stated to him that his proportion of the payment was a certain sum, and that such sum must be paid at a certain time or he would lose his right to renewal. Instead of this, without any information to the Plaintiff, the Defendants make a voluntary payment of

(a) 8 T. R. 366.

(b) 1 East, 619.

(c) 1 T. R. 229.

(d) 1 Sch. & Lef. 443; S. C., 2

Dow, 437, 452, per Lord Eldon.

(e) Id. 451, n.

(f) 2 S. & S. 29.

(g) 7 Sim. 211.

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the whole amount of the fine. The existence of any concurrent duty or obligation in such a case is rendered impossible by the acts of the Defendants.

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VICE-CHANCELLOR:

*Judgment.*  
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What the legal rights of the Plaintiff may be, is a question that it is not in any manner my intention to decide. If he has rights in a Court of law, he may assert those rights in that Court; but he has come here for the exercise of the equitable jurisdiction of this Court in a suit for specific performance,—the exercise of that jurisdiction being always subject to the discretion of the Court; which, although not an arbitrary discretion, is undoubtedly to be exercised with proper care and attention, in looking to the conduct of the parties and to the circumstances of each particular case. If there be a case in which this discretion as to specific performance is to be carefully exercised, it is a case like the present,—where there is no mutuality,—where the Plaintiff asserts a right to call for the specific performance of the covenant, and the Defendants have no means of enforcing that covenant against him.

It has been very strongly urged by Mr. *Selwyn*, that there was an improper amount of fine charged upon the Plaintiff. If he so thought, he should have then come into a Court of equity for the specific performance of the covenant, and put himself in the power of the Court, so as to enable the Court to compel him to pay a reasonable sum. If the Plaintiff has the equity which he asserts, and that without applying to a Court of equity to assess the amount of the fine, he might hold that equity not only for the three years for which it has been attempted to be held, but, for aught I can see, for twenty years longer, or an indefinite time, by simply saying, “You have imposed

an unreasonable fine upon me; I will not subject myself to the jurisdiction of a Court of equity to ascertain the proper amount of the fine I ought to pay, and you have no means of resorting to a Court of equity."

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I might, it is possible, have had more doubt upon the case, if the question had not been, as I conceive it to be, certainly concluded by the authorities. Mr. *Selwyn* has argued the question as if it depended upon the time for the original renewal of the lease by the first lessee, and not on the time of making an application to the under-lessee to contribute to the payment of the fine. But that is not the view taken in the *Irish* cases upon the subject, nor are those *Irish* cases, as the argument has assumed, dependent upon the *Irish* statute, but many of them are anterior to the existence of that statute; and in the case of *Lennon v. Napper* (a), the doctrine is distinctly laid down by Lord *Redesdale*. He distinguishes the case of mere neglect, which will not exclude the party from the right of renewal, from the case of wilful neglect or refusal to renew, after which a Court of equity will not interfere (b). Then what is a wilful neglect and refusal, which will exclude the equity? In the other cases, the non-payment of the proportion of the fine after demand made for the payment by the lessor, is so defined.

Now let us see what the facts of this case are: This lease was renewed in 1842. Nothing appears to have occurred between the parties till about the month of December, 1843, when application was made to Mr. *Westmacott*, who was the lessor of the Plaintiff, to know whether he could renew the lease. Through the medium of that application, the Defendants come into communication with the Plaintiff in the month of January, 1844; and as

(a) 2 Sch. & Lef. 682.

(b) Id. 686.

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*Judgment.*

early as July, 1844, the Defendants write through their solicitor to the Plaintiff, apprising him that they are advised by counsel, that the mode of bringing the matter to a termination is, to give notice to the Plaintiff that he must pay the fine within a certain time, or that they will not hold themselves bound by the covenant to renew. A correspondence goes on between the parties throughout the remainder of the year 1844. Nothing definite or conclusive appears in that correspondence; but I cannot say it at all impresses my mind with a notion that there was, throughout that year, any bonâ fide intention on the part of the Plaintiff to renew. On the 24th of October, 1845, the Plaintiff writes, stating, that it was his intention to renew; and the Defendants then offered to renew upon payment by the Plaintiff of 1023*l.* for the fine and expenses. Now, what is the conduct which the Plaintiff pursues upon that occasion? He desires to know what has been paid to the superior landlord, he having been in possession of the information ever since the early part of 1844. He is then told that he has had that information already furnished to him through his solicitor; to which the reply in effect is, "that it will cost nothing to give it to him again." On the 3rd of December, 1845, the Defendants, very sensibly I think, brought the matter to a termination, by giving the Plaintiff notice that they did not consider themselves bound to renew at all; but that they would renew if he would pay the stated proportion of the fine and expenses; and that if the amount was not paid within one month, they would decline to renew upon any terms. The Plaintiff did not think proper to make that payment. He did not file a bill for the purpose of putting himself under the control of this Court, which would have enabled him to pay his reasonable proportion of the fine; but he lies by from October, 1845, to some time in July, 1848, when he makes a fresh demand for renewal. Having made that fresh demand for renewal, he is quiet again till

August, 1849, and then he files the present bill. Under those circumstances I think I have rarely seen a more clear case for dismissing a bill, and dismissing it with costs.

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*Judgment.*

ECCLES v. CHEYNE.

THE claim stated, that *John Bibby*, by indentures of lease and release of the 1st and 2nd of July, 1831, conveyed and assigned certain real and leasehold and personal estate to *Thomas Gouthwaite* and *Thomas Reay*, upon trust, to sell and convert the whole of such property into money; and, after payment of the costs incident thereto, as to one-fourth of the proceeds and the income therefrom, upon trust, for *Mary Bibby* his wife, and after her decease, as she should by deed or will order or direct; and as to one other fourth part, in trust, for the absolute use of his son *William*; and as to another fourth part, in trust, for the absolute use of his son *Thomas*; and as to the remaining fourth part, in trust, to pay the income for the benefit of his son *Henry* for life; and after his decease, upon trust for all and every the child or children of the said *John Bibby* living at his death, and the issue of any of them who might be then dead (such issue taking a parent's share), as tenants in common: that the deed provided, that the rents of the property, until the sale, should be applied in like manner as the income would be applicable; and also provided for the change of trustees: that *Henry* died in January, 1832, at which time there were five children of *John Bibby* living; *John* his eldest son, *Thomas*, *William*, *Elizabeth*, and *Mary*; that *John Bibby* survived *Mary* his wife, and died in 1849; that the Plaintiff was the administrator of *Mary* the daughter, who died in 1840; that the Defendants, *Cheyne* and *Chard*, had been

*July 16th.*  
*August 8th.*  
 The Orders of the 22nd of April, 1850, relating to claims, were intended to apply to cases where the decree would have been of course, in a suit by bill bringing all proper parties before the Court.  
 The provisions in the General Orders of the 22nd of April, 1850, as to parties, are designed to save the expense of bringing before the Court, at the hearing, in the cases to which claims were intended to apply, persons whose interests are concurrent with those of the Plaintiff; and to restore the rule existing in Lord Hardwicke's time, which allowed such parties to be brought in before the Master.

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some years ago appointed trustees in the place of *Gouthwaite* and *Reay*, and had accepted such office.

The claim stated, that portions of the property only had been sold; and that *Cheyne* and *Chard* refused to execute the trusts or appoint new trustees. And the Plaintiff claimed to have new trustees appointed; an account of the trust property received by *Cheyne* and *Chard*, or which, without their wilful default, they might have received; the administration of the trust under the direction of the Court; and a receiver.

The trustees, *Cheyne* and *Chard*, were the only Defendants.

The affidavit of the Defendants stated, that *Mary Bibby*, the wife of the settlor, had made two wills, purporting to execute her power of appointment, one of which wills was dated in July, 1832, and the other in June, 1844; and that the Defendants were advised that it was doubtful whether the latter operated to revoke the former; but it stated that the latter will only had been proved.

*July 16th.**Argument.*


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Mr. *Rolt* and Mr. *Daniel* for the Plaintiff.

Mr. *Malins* and Mr. *Collins*, for the Defendants, contended, that the claim should be dismissed. — First, it did not appear upon the facts, necessarily, that the Plaintiff had any title whatever; for, if the limitation of the share of *Henry* to the children of the settlor living at his decease, and their issue, were construed to refer, in point of time, to the decease of the settlor (the last antecedent), *Mary*, the daughter, who died in 1840, would have taken no interest, and the Plaintiff only claimed as her administrator; that the other children of the settlor were not

parties to the claim; and therefore there were no parties before the Court to discuss the question of construction, and it could not be decided in their absence. Secondly, that the Court would not, on a claim, remove the trustees, or deprive them of the power of appointing other trustees in their place: *In re Hodson's Settlement* (a); or, at least, the Court would not do so upon the facts appearing upon the affidavits, which negatived any misconduct on the part of the trustees. Thirdly, that the charges of misconduct and default, and of the refusal of the trustees to act, having been negatived, the Court would not make a decree for the execution of the trust, which was only sought on the ground and as a consequence of such misconduct and default: *Johns v. Mason* (b), *Penny v. Penny* (c).

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Mr. *Rolt*, in reply, submitted to the dismissal of so much of the claim as sought to remove the trustees and to charge them with wilful neglect and default; and asked leave to amend the claim, by stating that the Plaintiff was one of the children of *Mary* the daughter, as well as her administrator.

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VICE-CHANCELLOR:

I hope it will not be understood, that, in taking the course I propose to take in this case, I am deviating from the course I laid down in *Johns v. Mason* (b) and in *Penny v. Penny* (c). The question in cases of this description appears to me to resolve itself into this, whether the Court can, upon the case stated, make a decree? It was intended by the Orders of April, 1850, to prevent the inconvenience and expense occasioned by bringing a number of parties in the first instance before the Court. [His HONOR stated the 7th and 8th Orders.] It is perfectly clear, from these

Judgment.

(a) Ante, p. 118.

(b) Ante, p. 29.

(c) Ante, p. 39.

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Orders, that one of the objects for which they are designed is, to avoid the expense which is occasioned by making numerous parties to a bill in respect of concurrent interests with that of the Plaintiff in the subject of the suit (a), and to revert to the practice of the Court which existed and was acted upon in Lord *Hardwicke's* time, when it was said of parties having such interests, that they might come in before the Master. I think the Orders were made for simple cases,—cases where the decree would be of course, according to the case made by the claim, upon a bill filed, provided all proper parties were before the Court. The present claim, perhaps, sins against that rule, in seeking to remove trustees, which would not be a decree of course; and it also goes beyond a decree of course, as to wilful neglect and default. I do not mean to lay down the rule, that the Court will not, in any case, remove trustees on these claims, or that it will not entertain a charge of wilful neglect and default; but they must be exceptional cases. If the claim resolves itself into a simple claim for administration, I think, the absence of the parties constitutes no objection to the decree being made; for the Court may take care that all proper parties are summoned before the Master, and that the trustees have that indemnity to which they are entitled.

I say nothing upon the question of construction, in the absence of the parties, beyond this,—that the question arises upon the will, whether the time at which the gift over is to take effect is the death of *Henry* or the death of the testator. Undoubtedly the children living at both periods must be represented; and the parties also must be summoned, who would be entitled if *Mary* the widow has not by her will made a valid appointment of the fourth share.

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(a) See *Watson v. Young*, 1 Sim. N. S. 114.



The claim was amended by adding the statement, that the Plaintiff was one of the children of *Mary* the daughter of the settlor.

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Minute.

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Dismiss the claim as to the appointment of new trustees, and as to the prayer for wilful neglect and default; and let the Plaintiff pay the costs of so much of the affidavits as relates to the charges of wilful neglect and default or misconduct on the part of the trustees. Inquire whether *Henry* is living or dead, and, if dead, when he died; what children of *John Bibby* the settlor were living at the time of the death of *Henry*, and at the time of the death of *John* the settlor; whether any and which of the children living at the date of the settlement have died, and when, and whether leaving any and what issue. Inquire whether *Mary Bibby* exercised the power of appointment given to her by the settlement, otherwise than as the same may have been exercised by the will of June, 1844; and who is her personal representative; and who is the heir at law and legal personal representative of the settlor. If the Master should find that the parties as to whom inquiries are directed are before the Court, or when they shall have been duly served with writs of summons, and have appeared before him, direct the accounts under the trust:—take an account of all the personal estate comprised in the deed, received by the trustees, in the usual form, also an account of the rents and profits of the estate, freehold, leasehold, and copyhold, comprised in the deed; whether any and what parts have been sold; when and by whom, and to whom, and for what sum of money; and an account of the purchase-money received by the trustees; and direct a sale of the unsold trust property. Reserve further directions and costs.

1851.

July 25th.

IN THE MATTER OF PLYER'S TRUST, AND OF THE  
TRUSTEE ACT, 1850.

Form of order appointing a trustee in the place of a trustee out of the jurisdiction, where there is another and continuing trustee, and the vesting order is not made.

ON a petition for the appointment of a trustee in the place of one out of the jurisdiction, there being another and continuing trustee, the vesting order was not deemed applicable (a), and the order was made in the form below.

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Mr. Pryor for the petition.

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Order.

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THIS Court doth order, that *Samuel Bowman*, in the petition named, be appointed a new trustee of the will of *William Plyer*, the testator in the petition named, in substitution for *Charles Plyer*, and in addition to the petitioner *William Plyer*. And it is ordered, that *Thomas Veasey*, of &c., the petitioner's solicitor, be appointed to join and concur with the said *William Plyer* in conveying the messuage, cottage, or tenement in the said testator's will mentioned, and thereby devised upon trust as therein mentioned, so that the same may become vested in the petitioner *William Plyer* and the said *Samuel Bowman*, for an estate of inheritance to them and their heirs in fee simple, as joint tenants, upon the trusts of the said testator's will. And it is ordered, that the said *Thomas Veasey* do convey or join and concur in conveying the said hereditaments accordingly.

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(a) See *In re Watt's Settlement*, ante, p. 106.

1851.

August 1st.

IN THE MATTER OF HEYS' WILL, AND OF THE  
TRUSTEE ACT, 1850.

THE petition was presented under the Trustee Act, 1850, for the appointment of a new trustee of a copyhold estate, in the place of deceased trustees. Under the 28th section of the Act, the Court is empowered to make a vesting order, with the consent of the lord of the manor, or otherwise to appoint a person to do all necessary acts for completing the assurance. The order, in this case, was asked for under the second alternative, and was made in the subjoined form.

Form of order appointing a new trustee of a copyhold estate, and appointing a person to complete the assurance of the estate to such new trustee.

Mr. J. Bailey for the petition.

THIS Court doth order, that *Thomas Rawstron* of *Laneside* near *Haslingden*, in the county of *Lancaster*, cotton-spinner, be appointed trustee of the will of *James Heys*, dated the 26th day of January, 1830, in substitution for and in the place of *James Benson* otherwise *Heys* and *William Robinson*, both deceased. And it is ordered, that the copyhold hereditaments and premises devised by the said testator's will, and now remaining unsold, do vest in *Thomas Rawstron* for such estate and interest as the said *James Benson* otherwise *Heys* and *William Robinson*, if living, would have, or as the said *Thomas Tattersall Robinson*, the customary heir of the said *William Robinson* deceased, now has therein. And the said *Thomas Tattersall Robinson* declining to act in the execution of the trusts of the will of the said *Thomas Heys*, it is ordered, that *Thomas Woodcock* of *Haslingden* aforesaid, in the place of the said *Thomas Tattersall Robinson*, do all such acts as may be necessary to vest the said copyhold estate in the said *Thomas Rawstron*.

Order.

1831.

July 10th,  
11th, & 25th.  
August 14th.

A suggestion by the trustees of a fund, that the administrator of one of the cestui que trusts, who, in that character, was entitled to a distributive share of the fund, had unfairly obtained the letters of administration under which he claimed such share, is no defence in this Court to the claim of the administrator; nor is it a defence for trustees to suggest that a deed, under which the Plaintiff derives his title from the cestui que trust, was founded on mistake, or is otherwise subject to be displaced; for it is contrary to the course of the Court to direct an inquiry as to the validity or invalidity of a deed, upon a suggestion in the answer of Defendants, the trustees of the fund to which

it relates, where the ascertainment of the validity or invalidity of the deed is not essential to the safety of the Defendants; and the fact of a bill having been filed to set aside the deed under which the claim is made, or exclude the fund in question from its operation, is not a ground upon which the trustees can resist the legal title to receive the fund; for the Court cannot give the Plaintiff in such other suit the benefit of an injunction to protect the fund upon the suggestion in the answer of the trustees; but the existence of such other suit entitles the trustees to retain such a portion of the trust fund as may be sufficient to answer their costs of such other suit.

### DEVEY v. THORNTON.

BY a settlement on the marriage of *William Devey* and *Ann Thornton*, in 1809, the sum of 5000*l.* 3*l.* per cent. Reduced Annuities was settled, upon trust, for *Ann Thornton* for life, and then for *William Devey* for life, and then for all and every or any one or more of the children of the marriage, as *William Devey* and *Ann Thornton* should jointly appoint; and in default of appointment, upon trust, for all the children of the marriage equally, the shares of sons to be vested at twenty-one, and of daughters at twenty-one or marriage.

There was issue of the marriage four children: the Plaintiff *Joseph*, the Defendants *William* and *Ann Agnes*, and a fourth child, *Thornton Devey*, who attained twenty-one and married, but afterwards died on the 28th of March, 1841. *Ann Devey*, the mother, died in 1835.

Upon the death of *Thornton Devey*, some disputes arose between his widow *Margaret* and his father *William Devey*; the father claiming to be entitled to some real estate as heir of his son, and to some personal property by gift from him; and *Margaret* the widow, on the other hand, alleging, that there was a will of the son in her favour; and that, if he died intestate, she was entitled to a moiety of the personal property claimed by the father, as well as of the other personal estate of the son. These disputes ended in a compromise between the widow and the father, which

was carried into effect by a deed, dated the 4th of May, 1841. By this deed, which was made between the widow of the one part, and the father of the other part, after reciting the disputes above mentioned, and that other disputes had arisen between the parties with respect to the claims set up by the widow to the real and personal estate of the son, and also reciting an agreement by the father to secure an annuity to the widow, and to give up some parts of the property to her, and that the agreement had been carried into effect on the part of the father,—the widow, in consideration thereof, released her interest in the real estate of the son, and in the personal estate of the son claimed by the father, and in all other his personal estate. But this deed made no express mention of the reversionary interest in the 5000*l.* stock held upon the trusts of the settlement.

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 —  
*Statement.*

After the execution of this deed, and on the 4th of May, 1843, administration to the estate of *Thornton Devey* was granted to *William Devey* the father, the widow having renounced; and the assets of the son were then sworn to be under the value of 50*l.*

*William Devey* the father died in November, 1849; and, upon his death, and on the 23rd of February, 1850, administration de bonis non to the estate of *Thornton Devey* was granted to the Plaintiff, upon the formal renunciation of the widow; and, on this occasion, it was found necessary to increase the duty which had been paid upon the letters of administration granted to the father; and an affidavit was made by the Plaintiff, in which he stated, that, since the grant of the former letters of administration, the true value of the estate of *Thornton Devey* had been ascertained, and it had been discovered that too little stamp duty had been paid thereon; for that, since the death of *William Devey*, the marriage settlement had

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—  
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been discovered, by which it appeared that *Thornton Devey*, as one of the issue of the marriage, took, on attaining twenty-one, a vested interest in one fourth of the 5000*l.* stock payable on the death of his parents, in default of any exercise of the joint power, which he believed had not been exercised.

The Plaintiff, after the letters of administration to the estate of *Thornton Devey* had been granted to him, applied to the trustees to divide the fund; and thereupon the solicitor of the trustees, on the 26th of February, 1850, wrote to the solicitor of the Plaintiff, inquiring whether the Plaintiff would take a transfer of his one-fourth share as one of the children, leaving the other one-fourth claimed by him as administrator to be dealt with thereafter; and also inquiring for copies of the letters of administration granted to the Plaintiff and to *William Devey*; and whether the trustees' costs would be discharged at the time of the settlement, or whether the trustees should sell stock and defray the costs out of the proceeds. Between the date of this letter and the 1st of March, 1850, the solicitor of the trustees inspected the letters of administration; and on the 1st of March, 1850, the Plaintiff's solicitor wrote to the solicitor of the trustees, requesting to know whether he was satisfied, and whether the trustees intended to settle the claims of the parties without further delay; and in this letter the Plaintiff's solicitor stated, that if the trustees still objected to transfer a moiety of the funds to the Plaintiff, that gentleman, in order to save unnecessary litigation and expense, would withdraw the distringas put upon the stock, and enable the trustees to transfer the three-fourths, to which the Plaintiff and *William* and their sister were entitled, leaving the other fourth, claimed by the Plaintiff as administrator, to be dealt with thereafter. According to the suggestion of the trustees' solicitor, and with reference to the costs, he added, that he apprehended that no difficulty would arise, but

that it could be easily arranged. No answer having been returned to this letter, the Plaintiff's solicitor again wrote to the solicitor of the trustees, on the 11th of March, 1850, to the same effect; and, this letter having been also left unanswered, he again wrote on the 14th of March, 1850, to the effect, that, his letter not having been answered, the Plaintiff intended to file a bill to enforce the distribution of the fund, unless the trustees distributed it on or before the next Monday, and that, in that case, he should seek to charge the trustees with the expenses of the suit; and in this letter the Plaintiff's solicitor again repeated the Plaintiff's offer, to accept one-fourth of the fund to which the Plaintiff was entitled as 'one of the children, leaving the one-fourth originally belonging to *Thornton Devey* for future disposal; and added, that he was ready to allow, on his part, all proper costs up to that time incurred by the trustees. On the 18th of March, the solicitor of the trustees replied, that in consequence of the claims set up by the Plaintiff to a moiety of the fund, costs, charges, and expenses had been incurred by the trustees, which they were advised were not chargeable on the trust-fund generally, but on the Plaintiff's share thereof; that the trustees were perfectly ready to transfer the whole fund to the parties entitled, but were advised not to dispose of it by piecemeal. That they were ready to adopt any means which the Plaintiff's solicitor could suggest for ascertaining the parties interested in the one-fourth of the fund, which was claimed by the Plaintiff as administrator, but which claim, the letter suggested, was apparently waived or abandoned. And, on the same 18th of March, the Plaintiff's solicitor wrote to the solicitor of the trustees in reply, stating, that the Plaintiff was ready to allow, out of the one-fourth part which he claimed as administrator, all such costs as the trustees might have properly incurred in respect of that one-fourth, in addition to such costs as might be properly chargeable on the general fund.

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—  
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—  
*Statement.*

That the solicitor of the trustees was mistaken in supposing that the Plaintiff ever intended to waive or abandon his claim as administrator; that he merely desired to meet the suggestion of the solicitor of the trustees, for immediate distribution of the other three-fourths of the trust fund, leaving the remaining one-fourth, derived through *Thornton Devey*, for subsequent disposal. And in this letter the Plaintiff's solicitor again called on the trustees to distribute the three-fourths without further delay, and stated, that his client would then take proceedings against the trustees for the remaining fourth, in case they should still be advised to resist the transfer.

The bill was filed on the 17th of April, 1850, against the trustees (who were the original trustees of the settlement) and against the other surviving children and a mortgagee of the Plaintiff's share, praying, either to remove the trustees or to have the trusts executed under the direction of the Court, and one moiety of the fund transferred to the Plaintiff, and the other moiety to the Defendants, the surviving children.

The answer stated the facts relating to the release and administration; and that the Defendants had been informed and believed that it had been then lately admitted by the Plaintiff's solicitor, that the share and interest of *Thornton Devey* in the trust funds under the settlement was not disclosed to the widow of *Thornton Devey* at the time of the execution of the release, and that she did not intend to release her right in the trust funds. That, after the Plaintiff claimed to be entitled to *Thornton's* share, they caused inquiries to be made as to how the Plaintiff had obtained the letters of administration to *Thornton Devey* to be granted to him; and that they had been informed and believed, that it was not disclosed by the Plaintiff, that *Thornton Devey* had left a widow, and that



the widow was still living; nor was the widow cited. That they believed that the widow of *Thornton Devey* had been, by the Plaintiff and his solicitor, kept in ignorance as to the share of *Thornton Devey* in the trust funds; and that the Plaintiff had obtained administration to her husband's estate to prevent her disputing the Plaintiff's right to *Thornton Devey's* share, which she would do if she were aware of the circumstances. That they believed the Plaintiff's solicitor was cognizant and had notice of the fact of the arrangement made with the widow of *Thornton Devey*, and that she was still living and resided in the neighbourhood of *London*; and that the Plaintiff and his solicitor had lately admitted, that *Thornton Devey's* interest under the settlement was not taken into consideration at the time the release was executed, and that they knew where the widow lived; but that the Plaintiff's solicitor, though applied to by their solicitor for the purpose, had not disclosed her address. The answer also stated, that the Defendants requested the Plaintiff's solicitor to procure the consent of *Thornton Devey's* widow to the transfer of his share in the trust funds, or, at the least, to apprise her thereof; but that the Plaintiff and his solicitor refused or neglected so to do. And the Defendants said, that they acted under the advice of counsel in refusing to distribute the trust funds without the assent of the widow of *Thornton Devey*.

The funds were transferred into Court. It was stated, at the hearing of the cause, that the widow of *Thornton Devey* had lately filed a bill to set aside the release of May, 1841.

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 Statement.

The *Solicitor-General* and Mr. *Speed* for the Plaintiff. Argument.

Mr. *Whitbread* for the Defendants, *William Devey* and *Ann Agnes Devey*.

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Mr. *Bethell* and Mr. *Glasse* for the Defendants, the trustees.

The case of *Lyse v. Kingdon* (a) was referred to.

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VICE-CHANCELLOR:—

Judgment.

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Two questions arise in the case: first, as to the distribution of the funds; secondly, as to the costs of the suit.

No doubt can, I think, be entertained, that it would have been the duty of the Court to have made a distribution of these funds, if the widow of *Thornton Devey* had not filed a bill for the purpose of impeaching the release. In the absence of such a bill, there would have been nothing more upon the records of the Court, than the mere suggestion by the trustees that the administration was not fairly obtained. This Court could not of course try the question, whether the administration was fairly obtained or not; and although the Court would have power to try the validity of the release on which the administration is said to be grounded, I apprehend that it is quite contrary to the course of the Court to direct an inquiry as to the validity or invalidity of a deed upon a suggestion in the answer of Defendants, at all events, in cases where the ascertainment of the validity or invalidity of the deed is not essential to the safety of the Defendants. It is not suggested that the widow of *Thornton Devey* ever gave any notice to these Defendants not to pay over his share to his administrator. It is not even suggested that these Defendants had not the means of communicating with the widow of *Thornton Devey*; although it is artfully suggested in the answer, that the Plaintiff's solicitor refused to inform them of her residence. If, in such a state of circumstan-

(a) 1 Coll. 184.

ces, the Court refused to pay over the fund to an administrator, the consequences would, I think, be most serious. Suppose an inquiry directed, and a report unfavourable to the administrator, but yet no bill filed, is the Court still to withhold payment, or when is the payment to be made? If the ground which in this case is suggested for impeaching the letters of administration be admitted as sufficient to induce the Court to suspend the payment, other grounds for impeaching probates and letters of administration must also be admitted; and I see no limit to the delay, expense, and inconvenience which would ensue from the Court's entertaining such questions in such a mode.

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 Judgment.

Then, does the fact of the widow of *Thornton Devey* having filed a bill to set aside the release make any difference in the case? I am of opinion that it does not. It has been decided, that the mere fact of a bill having been filed by an adverse party, impeaching the title to an estate, does not of itself prevent the Court from enforcing the specific performance of an agreement for the purchase of the estate. It has also been decided, that where probate or administration has been granted by the Ecclesiastical Court, this Court will not, upon the mere fact of a suit being instituted in the Ecclesiastical Court to recall the probate or administration, interfere by injunction to restrain the administrator from getting in the assets. A special case must be made for the purpose. These cases, and I may refer particularly to *Watkins v. Brent* (a), go far, I think, to decide the present question; and I think they are well founded in principle, for where there is a legal title to receive, the Court ought not, I think, to interfere, except where the legal right is abused, or there is proof by the party affected that it is in danger of being abused. If the widow of *Thornton Devey* has a case to restrain his

(a) 1 My. & Cr. 97.

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*Judgment.*

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administrator from receiving his assets, she should apply for an injunction in the suit which she has instituted (a).

(a) An application was afterwards made in the suit of

DEVEY v. DEVEY.

THIS suit was instituted in formâ pauperis by the widow of *Thornton Devey* against *Joseph Devey*, the administrator of his estate, (the Plaintiff in the first suit), claiming an interest in her husband's one-fourth share of the 5000*l.* stock, as not having passed by the general words of the deed of May, 1841, which purported to release to the father all her claim to every part of the real and personal estate of her husband *Thornton Devey*, on the ground, that the existence of that fund, as a portion of his estate, was not known or adverted to by either of the parties to the release.

*Argument.*

Mr. *Metcalf* moved for an injunction to restrain the Defendant *Joseph Devey* from receiving out of Court the share of the 5000*l.* stock, directed to be paid to him by the order in the principal suit, as the administrator of *Thornton Devey*. He contended, that the absence of any recital in the deed of May, 1841, of the existence of this fund, forming so large a part of the estate of *Thornton Devey*—the admission, that it had not then been adverted to, by the steps which had been taken afterwards to increase the probate duty—and by the fact that that increase was made upon the estate of *Thornton Devey*; whereas, if the fund had passed by the deed to the father, the sum ought to have been treated as a part of the father's estate: all went to prove that the parties had never intended by the deed of May, 1841, to pass the interest of *Thornton Devey* in the stock; and that, in a case at least of doubt, the Court would retain the fund until the hearing of the cause.

The motion was made upon the answer of the Defendant. The answer alleged, that the Plaintiff, the widow, and her advisers, knew of the existence of the reversionary interest of *Thornton Devey* in the stock in question at the time of entering into the agreement for the release.

*Judgment.*

The VICE-CHANCELLOR stated the facts as they appeared on the bill and answer, and adverted to the allegation in the latter, of the widow's knowledge of the existence of *Thornton Devey's* interest in the stock in question. He said, that whether that were so or not, the deed of May, 1841, was an arrangement entered into between the

A decree for payment by the trustees will not prevent her from doing so. I cannot give her the benefit of an injunction in this suit upon the suggestion made by the answer of the trustees.

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There is, however, one consideration which requires attention on the part of the trustees. Having been made parties to the suit by the widow, they may possibly incur costs in that suit which they may not be able to recover from her, and for such costs they may have a lien upon the trust property vested in them, a lien which I think would extend over the whole trust property. To this extent I think they must be protected.

It remains only to consider the question of the costs of

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father and his daughter-in-law for the settlement of their disputed claims; there was no allegation of any concealment by the father of his deceased son's reversionary interest in the stock; the bill proceeded on the assumption, that the father did not know, or had altogether forgotten, the existence of that interest. The deed itself purported to pass every thing that *Thornton Devey* possessed. In such a case, suppose the deed to have been founded on some degree of mistake as to the actual property which belonged to him, and that there was some degree of mutual ignorance as to their rights, he was not aware of any instance in which the Court had set aside a family arrangement of that nature. It was not, however, necessary to decide that question. The answer alleged, that the Plaintiff knew of her husband's reversionary interest; and if that were so, it would be impossible for her to sustain the case set up by the bill. He referred to *Collier v. Squire* (a). The general words in this case, there was no doubt, were large enough to pass, and would, if not displaced or restricted, operate to pass, the interest of *Thornton Devey* in the stock in question: there was no allegation of insolvency of the administrator, to require the protection of the Court on that ground; and the motion must be refused.

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Mr. Speed for the Defendant was not heard.

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(a) 3 Russ. 467.

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*Judgment.*

this suit. It is no doubt of great importance that trustees should be indemnified in the due execution of their trust; but it is, on the other hand, of scarcely less importance that they should not be permitted to involve their cestui que trusts in litigation and expense, by suggesting doubts upon their title, the solution of which is not essential to their own safety. It cannot, I think, here be doubted, that, at the time when this bill was filed, the trustees might, with perfect safety, have paid over the whole of these funds. And what course have they taken? They raise a question on the title of the administrator, who is clearly their cestui que trust. They then propose to pay over the whole fund, except the administrator's share; and when this offer is accepted, they refuse to distribute the fund by piecemeal. They have taken upon themselves to inquire into matters which did not affect them, and to raise questions on the title of their cestui que trust; and whatever may have been their motive for doing so,—a question which may be the subject of inquiry if they should come to the Court in this suit for any costs incurred in the widow's suit,—they must, I think, bear their own expenses of proceedings which have resulted from their own conduct. I can give them no costs of the suit. With reference to their having acted under the advice of counsel, it does not appear upon what statements such advice was given, nor can I venture to hold that the opinion of counsel will, in all cases, entitle trustees to their costs of suit. I think I allow full weight to the opinion in this case in giving no costs against the trustees.

It is not, necessarily, sufficient, to entitle trustees to their costs of a suit, that they have acted under the advice of counsel.

*Minute.*


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REFER it to the Master to inquire what sum of money will be sufficient to answer the trustees' costs of the suit instituted by the widow. Let what the Master shall find to be sufficient for that purpose, be carried over to an account, to be intitled "The Widow's Suit Costs Account," without prejudice to any question as to the right of the trustees to the payment of any costs thereout. Let the fund carried

over be invested and accumulated. Let the Master inquire, whether the trustees have properly incurred any costs, charges, or expenses which have not yet been paid, in relation to the trust, not being costs of this suit, or costs, charges, or expenses arising from or connected with any question touching the letters of administration, or the release in &c. And let the Master tax and settle such costs, charges, and expenses, if any. Let the Master tax all parties, except the trustees, their costs of the suit, the Defendant *J. Matthews*' costs as between solicitor and client. Let what the Master shall tax for such costs, charges, and expenses, if any, and for the costs, except what he shall tax for the costs of the Defendant *J. Matthews*, be raised and paid out of the fund in Court. Let one-fourth of the residue of the fund be transferred and paid to the Plaintiff as administrator, one-fourth to the Defendant *William Devey*, and one-fourth to the defendant *A. Devey*; and out of the remaining fourth, let the principal and interest due to *Matthews*, (by consent), to be verified by affidavit, and *Matthews*' costs, be paid to him. Let the remainder of that one-fourth be transferred and paid to the Plaintiff. Liberty to apply.

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The fact that the Plaintiff and the Defendants *William* and *Ann*, and their deceased brother, were the only children of *William Devey* and *Ann* his wife, was proved by affidavit at the hearing, under the statute 13 & 14 Vict. c. 35, s. 28; and on behalf of the Plaintiff, affidavits made by the solicitor, and also by one of the household of *William Devey*, were also tendered as evidence that no appointment of the trust fund had been made by the husband and wife.

It was submitted, that the statute permitted a party to prove by affidavit, at the hearing, not only those facts which were commonly the subject of inquiry before the Master under the old practice—such as, who were the persons forming a particular class—but other facts which might, under the old practice, have been the subject of dispute and of proof in the ordinary way, as the execution or non-execution of a power of appointment.

Affidavits admitted at the hearing, under the stat. 13 & 14 Vict. c. 35, s. 28, as evidence that no appointment of trust funds had been made by deceased persons, in support of a suit by a party claiming in default of appointment.

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—  
*Judgment.*

The VICE-CHANCELLOR, after conferring with another Judge of the Court, admitted the affidavits as evidence, requiring, in addition, an affidavit from the Plaintiff as to the fact, whether he did or did not know of any appointment having been made.

*July 18th.  
Trinity  
Vacation.*

## WATERHOUSE v. STANSFIELD.

Whether the Court will enforce against Defendants, having in their hands proceeds of the sale of land situated out of the jurisdiction, the equities to which such proceeds would have been subject if the land had been situated within the jurisdiction, depends upon the question, whether the contract which is sought to be enforced was or was not, by the *lex loci rei sitæ*, capable of being fulfilled.

THE claim of *Daniel Waterhouse, Roger Waterhouse, and Thomas Bouch*, brokers and copartners at Liverpool, carrying on business under the firm of *Waterhouse & Sons*, that the Defendants, *Hutton Hamer Stansfield, Thompson Hankey, William Robinson Sandbach, and Edmund Pontifex*, the assignees of *Shute Barrington Moody*, a bankrupt, might be declared trustees for the Plaintiffs of the proceeds of the sale of an estate in *Demerara*, to the extent of the sum of 3010*l.*, and interest thereon from the time that two sums of 2000*l.* and 1010*l.* respectively were advanced, and the costs of the suit; and that the Defendants might be ordered to pay the said sum of 3010*l.* and interest and costs to the Plaintiffs.

The material facts stated by the claim, and proved by the affidavits, were these:—

If a contract relating to land situated out of the jurisdiction be one which the *lex loci rei sitæ* renders incapable of fulfilment, the Court will not enforce the contract against the proceeds of a sale of such land coming to the possession of parties within the jurisdiction, though they take such proceeds bound by the same equities as affected the party to the contract under whom they claim.

On the 14th of August, 1845, *Shute Barrington Moody*

The rights of the parties interested in the proceeds of the sale of land situated out of the jurisdiction do not cease to be governed by the *lex loci rei sitæ* by the circumstance of such proceeds being brought in specie within the jurisdiction.

A law permitting alienation of land, only upon the terms of the proceeds being applied in a particular manner, is a restraint upon alienation; and restraints upon the alienation of land are always governed by the *lex loci rei sitæ*.



agreed to purchase from *William Grant* some real property in *Demerara* for 4250*l.*; and on the 28th of September, 1846, he borrowed 2000*l.* of the Plaintiffs upon the security of the property he had agreed to purchase; and thereupon, by an indenture dated the 10th of October, 1846, and made between *Moody* of the one part, and the Plaintiffs of the other part, *Moody* purported to grant, convey, and assign to the Plaintiffs the property agreed to be purchased, and the benefit of the purchase contract, upon trusts for securing the 2000*l.* and interest and further advances, and covenanted to make, do, and execute all such further acts and assurances as should be required, as well for further assurance as for conveying and transporting the premises according to the laws of the colony; and he also authorised the Plaintiffs to nominate any person to do and execute any acts, deeds, matters, and things in the colony, necessary or proper for perfecting the transport or mortgage, and giving the Plaintiffs the full benefit of the securities thereby intended to be given. By a power of attorney of even date, *Moody* and the Plaintiffs appointed *Thomas Porter* their attorney, *Moody* authorising him to accept a transport or conveyance to him from *Grant*, and thereupon to make the transport or conveyance to the Plaintiffs; and the Plaintiffs authorising him to accept the last-mentioned transport or conveyance. The deed of the 10th of October, 1846, and the power of attorney were transmitted to *Porter* in *Demerara*; and at the time of their execution there was a bill of exchange running for 1010*l.*, the balance of the purchase money due from *Moody* to *Grant*, and which bill the Plaintiffs undertook to pay, and soon afterwards paid accordingly, with the concurrence of *Moody*. Upon the payment of this bill by the Plaintiffs, *Grant* sent out a power of attorney to his agent in *Demerara* to pass the estate to *Moody* or the Plaintiffs, his mortgagees; and some proceedings were taken by *Porter* in the colony to effect the transport to

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the Plaintiffs; but before the Plaintiffs' mortgage was completed, and on the 15th of January, 1847, *Moody*, by another deed similar to the deed of the 10th of October, 1846, purported to mortgage the premises to *Thompson Hankey & Co.*, subject to a prior mortgage for 1000*l.*; and *Thompson Hankey & Co.* having sent out instructions to their agent in *Demerara* to effectuate their mortgage, he obtained an interdict from the Court at *Demerara*, to prevent the completion of the Plaintiffs' mortgage. On the 12th of May, 1847, a fiat in bankruptcy issued against *Moody*. The Defendants, the assignees under the fiat, completed *Moody's* title to the premises, and sold and conveyed them to a purchaser, and received the purchase-monies.

The Plaintiffs, under these circumstances, filed their claim, thereby alleging, that, by the transactions with them, they became equitable mortgagees of the premises contracted to be purchased by *Moody*; that his title under the contract vested in them; and that the assignees took the produce of the estate subject to the equities which affected the same.

The case set up by the affidavit in answer to the claim was, that, to render a mortgage on real property effective according to the law of *Demerara*, the intention of passing the mortgage must be advertised in the official *Gazette* on three successive Saturdays, before the mortgage can be passed; and that, after the advertisements, the mortgage must be passed before one of the Judges of the Supreme Court of the colony; that, as the property in question was immovable, it was governed by the law of the colony; and that, therefore, no *English* deed could affect it: and that, by the law of the colony, every creditor had a right to prevent his debtor, solvent or insolvent, from giving a preference, by mortgage or otherwise, to any other creditor. The affidavit also stated, that, in July, 1847, the attorney of

*Moody* appeared to the suits, at the instance of the Plaintiffs and of *Hankey & Co.*, and pleaded the bankruptcy as a bar to further proceedings; that the Plaintiffs then dropped their proceedings in the Court of *Demerara* for effectuating their mortgage; that the Plaintiffs' suit was thereby determined; and that the premises became vested in the assignees as if no such suit had been instituted.

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Mr. *Bacon* and Mr. *Glasse*, for the Plaintiffs, contended, that, although the deed of the 10th of October, 1846, might not be effectual as a conveyance of or charge upon the estate, according to the law of *Demerara*, yet, that it was of force in this Court, as affecting the conscience of the party, the Court acting in personam; and that the assignees, who had received the purchase-money, stood in the same position as *Moody*, the bankrupt, himself would have stood, and claimed by no higher title. The purchase-money, being in the hands of the assignees and within the jurisdiction of the Court, must be accounted for and applied according to the equities which attached upon it in this country: *Ex parte George Pollard*, *In the matter of Thomas Courtney and George Courtney* (a), and *Martin v. Martin* (b). The case of the Plaintiffs was strengthened by the fact, that they had actually paid a part of the purchase-money owing by the bankrupt for the estate, and, as to that, should stand in the place of the purchaser.

Argument.

Mr. *Rolt*, for the Defendants, relied on the law of *Demerara*, as having effectually given to them the proceeds of the estate: 2 Burge Col. Law, p. 582; Van der Linden's Institutes of the Laws of Holland, translated by Henry, p. 177, note by translator; Voet. lib. xx. De Pignoribus, &c. tit. 1, ss. 9, 10. There was no equity in this country to displace the effect of a colonial or foreign law, as to im-

(a) 3 Deac. 367; 3 Mont. & Ayr. 340; *S. C.*, on Appeal, 1 Mont. & Chit. 239.

(b) 2 Russ. & Myl. 528.

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*Argument.*

moveable property situated within the colonial or foreign jurisdiction. The contract of the Plaintiffs, moreover, did not give them what they now claimed, the proceeds of the estate arising from a sale. It did not contemplate such a case. All that it expressed to give was a mortgage; and if that mortgage was or became unlawful and invalid, the Plaintiffs were not entitled in equity to supply what the contract failed to give, by recovering the proceeds of a sale made adversely to the Plaintiffs.

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VICE-CHANCELLOR:—

*Judgment.*

Upon the argument of the claim several points were made on the part of the Plaintiffs.—First, that the Defendants, the assignees, are bound by all the equities by which the bankrupt was bound; and that the Court, finding them in possession of the proceeds of an estate, which by contract with the bankrupt was bound in favour of the Plaintiffs, will give effect to the contract against those proceeds. Secondly, that it is not clear, that the creditors could have stopped the mortgage; and that, assuming that they could, they took no steps for the purpose. And thirdly, that at all events the Plaintiffs are entitled to a lien upon the proceeds of the sale for the purchase-money which they paid to *Grant*.

The case of *Ex parte Pollard* (a) was cited upon the first point; but in that case the law of *Scotland* presented no impediment to the mortgage being completed. The contract bound the bankrupt, and therefore his assignees, and there was no impediment to its completion; but in this case the contract indeed may bind the bankrupt and the assignees, and yet by the law of *Demerara* may not have been capable of being fulfilled. The two cases there-

(a) 4 Deac. 27, and 1 Mont. & Chit. 239.

fore are widely different, and I cannot hold this case to be governed by *Ex parte Pollard*. If it can be decided in favour of the Plaintiffs without some further inquiry, it must, I think, be upon the more broad and general ground, that the property having been sold and the proceeds of the sale received by the Defendants, the assignees, the rights of the parties have ceased to be governed by the law of *Demerara*, the *lex loci rei sitæ*, and must be governed by the law of this country, the *lex loci contractûs*.

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No authority has been cited, nor have I been able to find any, which touches this point; but I think it must depend upon the question how far the *lex loci rei sitæ* extends. If it regulates not merely the disposition of the estate itself, but also the disposition of the proceeds of the estate, it cannot, I think, be permitted that a different law should intervene and defeat those regulations. The interest in the proceeds is in substance and effect an interest in the estate itself; and no rule is more universal than that the *lex loci rei sitæ* governs the disposition of the estate. If the *lex loci rei sitæ* only permits the alienation of the estate upon the terms of the proceeds being applied in a particular manner, this is a restraint upon the alienation; and there is no doubt that the restraints which may be put upon alienation must in all cases be governed by the *lex loci rei sitæ*. Again, how could a contract to dispose of the proceeds of an estate in a manner contrary to that prescribed by the *lex loci rei sitæ* be enforced? I cannot therefore adopt the broad position contended for on the part of the Plaintiffs, but must send the matter to the Master for further inquiry as to the law of *Demerara*.

The second point is also one upon which further inquiry must I think be directed.

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Upon the third point it was argued, on the part of the Defendants, that the monies paid by the Plaintiffs to *Grant* were part of the monies advanced upon the mortgage; and that the Plaintiffs, therefore, could claim no lien in respect of such monies; and further, that the Plaintiffs have by the claim put their case wholly upon the mortgage, and could not therefore be permitted to maintain it upon the claim of lien; but the claim states the payment to *Grant*; and I think there is enough upon it to warrant the Court in acting upon the lien, if it in fact exists; and whether it exists or not, is a question of *Demerara* law, and must therefore I think also be the subject of inquiry.

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Minute.

REFER it to the Master to inquire and state to the Court whether, according to the law of *Demerara*, the Plaintiffs, under or by virtue of the indenture of the 10th of October, 1846, or by the payment made by them to *William Grant* on account of the purchase-money of the premises comprised in the agreement of the 14th of August, 1845, acquired or became entitled to any, and, if any, what right, estate, or interest, lien, or charge, in, upon, or against the premises comprised in the said agreement, or upon or against the said *S. B. Moody*, or the Defendants, his assignees, in respect of such premises; and whether such right, estate, or interest, lien, or charge, if any, was absolute, or liable to be defeated by any and what person or persons, and in any and what manner; and whether the same is now subsisting and in force, or has been in fact defeated, and how, and by whom; and whether, according to the said law, the said *S. B. Moody* before he became bankrupt, and whether or not the Defendants his assignees since his bankruptcy, had power to sell the said premises, discharged from the claims of his creditors, or any and which of them; and whether such creditors, or any and which of them, had, according to the said law, any power to prevent such sale, other than as general creditors of the said *S. B. Moody*, under the said fiat; and when and how, and under what circumstances, and in what right, the said Defendants sold the said premises and received the proceeds of the sale thereof. Liberty to the Master to state special circumstances as to all or any of the matters aforesaid. Reserve further directions and costs.

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## MORISON v. MOAT.

Aug. 5th, 6th,  
& 20th.

A MOTION for an injunction to restrain the Defendant from making or selling medicines as "Morison's Universal Medicine," and from using the name, and using or communicating the knowledge or secret of their composition.

The Plaintiffs were *Alexander* and *John Morison*, the two sons of *James Morison*; they were also two of the surviving partners in the firm of *Morison, Moat, & Co.*; and they were, under the will of *James Morison*, legatees of the recipe and prescription for preparing the medicine, upon trusts for themselves and other members of the family of *James Morison*. The Defendant was the son of *Thomas Moat*, and was the appointee of his share in the partnership, and the other surviving partner in the firm. The question was, whether the partnership and the attendant circumstances had given the Defendant the right which the Plaintiffs sought to restrain him from assuming or exercising.

The partnership was formed by *James Morison* and may notwithstanding have a good title to protection against the particular Defendant.

The case of a secret acquired by a breach of faith or confidence, but communicated to a purchaser for value, without notice of any obligation affecting it, distinguished from that of a party whose claim of right to use the secret is that of a volunteer.

The Court, in interfering in such cases upon the ground of faith or confidence, fastens upon the conscience of the party, and enforces the obligation against him, as it enforces, against a party to whom a benefit is given, an obligation to perform a promise upon the faith of which the benefit has been conferred.—*Semble*.

If a partner in a business, in which a secret process of manufacture and composition of materials is used, who has not, under the partnership contract, a right to the knowledge of the secret, should openly take part in the manufacture, and should, with the knowledge and concurrence of his partners, be permitted to acquire a knowledge of the process and ingredients, the other partners will be considered to have waived a right to the preservation of the secret for their separate benefit.—*Semble*.

The injunction restrained the sale of medicine by the Defendant under the name of the medicine prepared according to the secret prescription, not on the ground of the use of the name alone, but because it was by the use of the name that the Defendant was availing himself of the breach of faith and contract. Whether, apart from that ground of interference, the Court would have restrained the use of the name before the Plaintiff's right had been established at law—*Quære*.

An injunction granted to restrain the use of a secret in the compounding of a medicine, not being the subject of a patent, and to restrain the sale of such medicine by a Defendant, who acquired a knowledge of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence.

A Plaintiff, not having the privileges of a patentee, may have no title to be protected in the exclusive manufacture and sale of a medicine against the world; but he

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*Thomas Moat*, by a deed of the 23rd of June, 1830, which recited, that *James Morison* was the inventor and sole proprietor of the medicine, the secret of making which he had communicated to his son *John*; and that *James Morison* had, in consideration of the past services of *Thomas Moat*, and in further consideration that *Thomas Moat* should devote his whole time and attention to the conduct and promotion of the manufacture and sale of the medicine, agreed to take him into partnership with him (*James Morison*) in the manufacture and sale of such medicine, upon the terms therein stated. The material terms were, that they were to be partners in the profession and business of manufacturers and vendors of the medicines for twenty years and three-quarters, from the 24th of June, 1830; the style of the firm to be "*Morison, Moat, & Co., Hygeists*;" the business to be carried on in certain specified premises, and there and thence alone (excepting the foreign establishments) the medicines were to be compounded and issued to the agents of the copartnership; with power to the partners for the time being to remove the establishment as might be convenient; the premises where the business should be carried on to be called "*The British College of Health*;" the partners to be entitled to the profits, and liable to the losses, in the proportion of two-thirds to *James Morison* and one-third to *Thomas Moat*. If *Thomas Moat* should die before the 25th of March, 1851, his interest in the copartnership not to devolve upon his personal representatives; but to belong to such person (not being a female) as he should appoint; and, in default of appointment, to devolve upon *James Morison*, his appointees, executors, administrators, or assigns. *Thomas Moat* was to devote his time and attention in the conduct and promotion of the manufacture and sale of the medicine, or in such other manner as should best conduce to the advantage of the partnership; *James Morison* not to be obliged to devote any more time or



attention thereto than he should think proper. *James Morison* to be at liberty to introduce into the partnership any person or persons whomsoever (not being a female) upon the same conditions as *Thomas Moat* was subjected to. *James Morison*, on or before the commencement of the partnership, to communicate to *Thomas Moat* the knowledge of the mode of making and compounding the medicine, and to be at liberty to communicate such knowledge to such person or persons as he was thereby empowered to introduce into the partnership. *James Morison*, notwithstanding anything therein to the contrary, to be at liberty to form an establishment in any part of the world, except the *United Kingdom* and *America*, for the manufacture and sale of the medicine; and all which he might order or receive from the partnership to be charged to him at a certain price. If *Thomas Moat* should live to the expiration of the partnership, a new partnership for a further term to be agreed upon between the parties to be entered into on similar terms. And there were provisions for taking the accounts of the partnership in the event of the death of either, or of the introduction of a new partner.

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Contemporaneously with the partnership deed, two bonds were executed, bearing the same date as the deed, one by each of the partners to the other, and each being for the penal sum of 5000*l.*, reciting the partnership deed; that the prosperity of the partnership would depend upon the ingredients and the mode of making and compounding the medicine being kept secret; and that *James Morison*, the inventor thereof, had communicated the secret to *Thomas Moat*. The condition of the bond of *Thomas Moat* was, that he should not at any time or times thereafter, in any way or manner, make known or divulge or communicate the said secret to any person or persons whomsoever. The condition of the bond of *James Morison* was, that he should not at any time thereafter, in any

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way or manner, make known or divulge the said secret of the ingredients, and the mode of making and compounding the medicine or medicines, to any person or persons whomsoever, save and except such person or persons as he and the said *Thomas Moat* might introduce into the partnership under the powers of the partnership deed or any of them, and except such person or persons as *Morison* might introduce into the foreign partnerships, which he was thereby authorised to establish.

*James Morison* introduced into the partnership the Plaintiff *Alexander*, in June, 1834, and the Plaintiff *John*, in July 1835, and gave each of them one-twentieth of his (*James Morison's*) share. By a deed of January, 1836, *James Morison* appointed, that, at his decease, the Plaintiffs should be partners in the remainder of his share.

Shortly after the date of the partnership deed, *Thomas Moat* appointed his son *Horatio* to succeed him in the partnership. On the 29th of July, 1835, an agreement was entered into between *James Morison*, *Thomas Moat*, and the Plaintiffs, of the first part; and *Horatio Moat* and the Defendant, of the second and third parts; whereby, after reciting the intention of *Thomas Moat* to appoint his share to the Defendant instead of to *Horatio Moat*; and that *Thomas Moat* had for some time been in ill health, which had prevented him from attending to the business of the partnership; and that it was intended that the Defendant should, during such time as *Thomas Moat* continued unwell, transact the business of the partnership for *Thomas Moat*, so far as he was able to do not being a partner, and for which services *Thomas Moat* was to pay him a fixed salary: It was agreed, that *Thomas Moat* should be allowed to revoke his appointment of *Horatio Moat* in favour of the Defendant; and that, until the new appointment was executed, the appointment in favour of

*Horatio* should be placed in the hands of the bankers of the partnership; and that the Defendant was to be allowed to come into the office as his father's servant for such time as *Thomas Moat* was unable to attend thereto, and to be paid by his father a fixed salary. The appointment of the share of *Thomas Moat* to *Horatio Moat* was revoked, and the appointment of the same share to the Defendant substituted by a deed of the 8th of August, 1835, made between all the parties to the preceding agreement.

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*Thomas Moat* died on the 11th of August, 1835.

By a deed of the 25th of January, 1837, made between *James Morison* and the Plaintiffs of the one part, and the Defendant of the the other part, reciting, that the business of hygeists and manufacturers and vendors of "*Morison's Universal Medicine*" had been carried on by the parties in partnership since the death of *Thomas Moat*: It was witnessed, that *James Morison* and the Plaintiffs and the Defendant (if he should so long live), should remain, until the 25th of March, 1851, partners in the business of hygeists and manufacturers and vendors of the medicine in *Great Britain* and *Ireland*, and in all other countries and places (except *France*, *Italy*, and *Switzerland*, and also except *Africa*), upon the terms thereafter contained: viz. The style of the firm to be the same as before; the premises where the business was to be carried on to be called "*The British College of Health*;" the medicines to be called "*Morison's Universal Medicine*," and sold under that name only; two-thirds of the profits to be taken by *James Morison* and the Plaintiffs, and one-third by the Defendant; the *Morisons* to have the whole management of the business, and the Defendant to be and be considered a sleeping partner, and not in anywise to interfere in the conduct or management of the business of the partnership, or draw or accept any cheques,

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drafts, or bills, for or on account of the partnership, or buy, order, or contract for any goods, merchandise, articles, or things whatsoever, for or on behalf of the partnership; the Defendant to be at liberty, once a quarter, to inspect the books, documents, and writings relating to the partnership, and to make extracts from and to take copies of the same; and, if he should think proper, to assist in taking the annual account, rest, and valuation, to be made pursuant to the provisions thereinbefore contained; and to sign the books wherein the general account or rest and valuation and appraisement were to be entered every year, and to be bound and concluded by the general account. The deed contained a covenant, "that none of them, *James Morison*, the Plaintiffs, or the Defendant, would communicate or make known to any person or persons whomsoever, not being a partner or partners in the partnership, all or any of the prescriptions for the making and compounding of the medicines; and that each and every of the said parties who should, contrary to such stipulation, communicate or make known to any person or persons, not being a partner or partners in the partnership, the prescriptions or any of them, should pay to the fund of the partnership, as and by way of liquidated damages, for the sole benefit and advantage of the others or the other of the said parties, the sum of 10,000*l*." The deed also contained provisions for taking an account of the monies and effects of the partnership, and of the debts and liabilities thereof, with all convenient speed, after the 25th of March, 1851, or the sooner determination of the partnership; and that thereupon all the estate and effects, and debts, belonging or owing to the partnership, should be respectively sold, called in, and converted into money, and the debts and liabilities due from the partnership should be paid, and the balance of the monies, estate and effects, and debts owing to the partnership, should, after making such payments as afore-said, be divided between the parties respectively entitled thereto.

*James Morison* died in May, 1840. By his will, reciting that the appointment of his share in January, 1836, to the Plaintiffs, was made in trust for him: he bequeathed the recipe and prescriptions for preparing, manufacturing, and compounding the medicines unto his sons, the Plaintiffs, during their lives or the life of the survivor; and he declared, that in case the partnership should be subsisting at the time of his death, the Plaintiffs should stand possessed of the same, and prepare, manufacture, and compound the medicines conformably to the provisions contained in the partnership deed, in *Great Britain and Ireland*, and *America*, respectively, for the benefit of the partnership, so long as the partnership should continue under the said deed; and should, as to *Great Britain, Ireland*, and *America*, from and immediately after the determination of the copartnership, in case the same should be subsisting at the time of his death, or from and immediately after his decease, in case the partnership should not be subsisting, and as to all other states and countries, immediately after his decease, compound and vend the medicines as they should think fit; and, after the death of the survivor of the sons, at the expiration of the term of twenty-one years, he directed the recipe to be sold, and the monies to arise from the sale paid to his executors as part of the residue of his personal estate; and the testator directed that *Alexander Morison* and *John Morison* should immediately after his decease, and that every other person who should become entitled to the possession of the recipe under the bequests thereinbefore contained, should forthwith on his continuing to prepare, manufacture, and compound the medicines, enter into and deliver to his executors a bond in the penal sum of 10,000*l.*, with a condition, that such obligor should not at any time communicate or make known, either directly or indirectly, to any person or persons whomsoever, except the purchaser or purchasers thereof under the said

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trusts, the recipe for making the medicines; but the testator authorised the parties in possession of the recipe to form establishments in any other country, if they should think fit.

In the year 1843 some deeds were executed by the Plaintiffs and Defendant for the purpose, among others, of settling the accounts of the partnership of *James Morison* and *Thomas Moat*, and securing an annuity to the widow of the latter. These deeds recited the will of *James Morison*, and the dispositions thereby made of the recipe.

The partnership expired on the 25th of March, 1851; and thereupon the stock of drugs, manufactured medicine, labels for boxes, and Government stamps was divided between the parties, according to their respective shares; and the stock of printed bills and advertisements and other printed papers was taken by the Plaintiffs, they paying the Defendant one-third of the cost price.

Soon after the termination of the partnership, the Defendant began to make and sell the medicine in a shop, on the sign-board of which he described himself as "Of the late firm of Morison, Moat, & Co., British College of Health. Mr. Moat. Dépôt Morison's Universal Medicine," and publicly advertised the medicines which he sold as "Morison's Universal Medicine," "prepared by Mr. Moat, partner of the late Mr. Morison, the Hygeist."

The Commissioners of Stamps had for many years appropriated four engraved plates or blocks for printing the Government stamps wrapped round the medicines. The Defendant, at the termination of the partnership, did not claim the right to use these plates; the same having, as he stated by his affidavit, then escaped his recollection. In March, 1851, the Defendant applied to the Commis-

sioners for a grant of a plate with the words "Morison's Universal Medicine, by C. W. Moat;" and this application not having been granted, he, in April, 1851, applied to the Commissioners to refuse the Plaintiffs the use of the original plates. This application having also failed, he, in May, 1851, claimed from the Plaintiffs a share of those plates; this being refused, the Defendant, in June, 1851, filed a bill against the Plaintiffs to have the partnership wound up, and the plates divided, and for an injunction to restrain the Plaintiffs from the use of them. The motion for the injunction was made on the 5th of June, 1851, and refused (a).

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The bill in this cause was filed in July, 1851. After stating the foregoing deeds, it stated that ever since the dissolution of the partnership, the Plaintiffs had used the secret and recipe for making and compounding the medicines, and had compounded and vended them, and had derived great profits therefrom; that they had recently discovered that the Defendant made and sold pills by the said name and description, and used labels on the pill-boxes containing pills, thereby described as "Morison's Universal Medicine, by C. W. Moat;" that such pills were made from or according to the recipe or prescriptions discovered by *James Morison*; and that the vending them as "Morison's Universal Medicine" was a fraud on the Plaintiffs; that the Plaintiffs had recently discovered (as the fact was) that the Defendant's father, *Thomas Moat*, about the time of executing the appointment of the 8th of August, 1835, communicated the secret of making and compounding the medicines, and delivered to the Defendant the original written recipe and prescription for compounding them, which *James Morison* had delivered to *Thomas Moat*, at the time of executing the partnership deed of the 23rd of June, 1830.

(a) *Moat v. Morison*—Before Vice-Chancellor Turner, 5th June, 1851, not reported.

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The bill charged, that *Thomas Moat* made the communication and delivered the recipe, and that the Defendant received the communication and recipe, in breach of good faith and of the stipulations and conditions of the said several deeds and bonds made in the lifetime of *Thomas Moat*; and that at the time of such communication and delivery, the Defendant was well acquainted with the said stipulations and conditions.

The bill charged, that the secret was never communicated to the Defendant by *James Morison*, or by any other person than *Thomas Moat*; and that *James Morison* was induced to concur in the appointment of the 8th of August, 1835, on the faith and assurance by *Thomas Moat* (who was then on his death-bed), that the secret of making and compounding the medicine had not been communicated, and would not be communicated by him to the Defendant or to any person whomsoever; and that he *Thomas Moat* had not committed the secret to writing. That it was on the faith and understanding, on the part of the Plaintiffs, that the Defendant did not know the secret of making and compounding the medicine, that *James Morison* and the Plaintiffs executed the deed of February, 1837, and the Plaintiffs executed the subsequent deeds.

The bill charged, that the Plaintiffs did not permit the Defendant to be present at the compounding of the medicine during the partnership; and that he never did acquire, by attending to the copartnership business, a knowledge of the secret of compounding the same; though, by inspecting the books of the partnership, he might acquire a knowledge of some of the ingredients of which the pills were made. That the Defendant was, at the dates of the deed of February, 1837, and the subsequent deeds, in possession of the secret unlawfully, and, as regarded the Plaintiffs, clandestinely, and without the same being known to



or suspected by them, and in contravention of the contracts of *Thomas Moat* with the Plaintiffs and *James Morison*, by which the Defendant was bound.

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The bill charged, that the Plaintiffs and the survivor of them were alone entitled, during their lives and the life of the survivor, to use the secret recipe and prescription, and to compound and vend the medicine. The motion was made on affidavits verifying the statements of the bill.

The Defendant, by his affidavit, in opposition to the motion, said, that his father *Thomas Moat*, as the active partner in the firm of *Morison, Moat, & Co.*, attended to and superintended the making and compounding the medicine. That, in pursuance of the agreement of the 29th of July, 1835, the Defendant attended at the office of the partnership and conducted the affairs thereof, in the place of his father; and in the performance of these duties he gained a knowledge of the ingredients used in making and compounding the medicine, and of compounding, preparing, and mixing the drugs for the same; and that the recipe was communicated to him by his father immediately before his death, and in contemplation of his succeeding him as a member and active partner in the concern; and the said written recipe agreed with the facts respecting the making and compounding the medicine of which he had so previously acquired a knowledge. And the Defendant stated, that, on the death of his father, he became an active partner, in the place of his father, and was so treated and acknowledged by *James Morison* and the Plaintiffs; and that, for a period of about two months, in common with his partners, or some of them, he superintended the business; and, during that time, he saw the mode and manner of making and compounding the medicine, and the ingredients thereof, and the proportions in which such ingredients were used; and he thereby acquired a complete

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practical knowledge of the ingredients of the medicine, and of the mode of compounding and mixing the same; and he became fully capable himself of making and compounding the said medicine.

The Defendant, by his affidavit, stated, that *James Morison* and the Plaintiffs knew, shortly after the death of *Thomas Moat*, and long before the execution of the deed of February, 1837, that the Defendant was in possession of the secret, or recipe, or prescription; and that, shortly after his father's death, and on several occasions previous to the 25th of February, 1837, the Defendant had conversations with *James Morison* and with the Plaintiffs relative to the prescription and to the preparing and manufacturing of the medicine; and that, at the time of each of such several conversations, *James Morison* well knew, and the Plaintiffs, as the Defendant believed, also well knew, that he had in his possession the said written recipe or prescription.

The Defendant said, that the medicine had been prominently brought before the public by an extensive system of advertising, at the cost of several thousands a year, during the partnership, including the last year of its duration; and that the Plaintiffs desired, by this suit, to secure to themselves the whole benefit resulting from that employment of the partnership funds.

The Defendant also said, that no patent or other exclusive right or privilege ever was granted to *James Morison*, or to any other person, for the making or selling the said medicine; that, in none of the partnership or other deeds was there any clause, contract, provision, or stipulation restraining the partners of the said firm, or any of them, from making, manufacturing, or vending the medicine, after the expiration of the partnership term. And the

Defendant claimed a right to make and sell the same; and he denied that his doing so was a fraud on the Plaintiffs, or that any of the deeds had been executed on the faith of the secret being unknown to him. The Defendant said, that he never wished it to be understood that the medicines which he sold were manufactured by the Plaintiffs, or by any person but himself; and, on the contrary, while he described them, as in fact they were, as the same medicines which were well known as "*Morison's Universal Medicine*," yet he had carefully expressed that they were made by himself.

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The affidavit of the Plaintiffs in reply denied that, upon the death of *Thomas Moat*, he became an active partner in the place of his father, or was so treated and acknowledged by the other partners, or that he ever became an active partner, or, in common with his partners, superintended the business, or ever saw the mode and manner of making and compounding the medicines, or thereby acquired any knowledge of the ingredients or of the mode of compounding and mixing the same. And one of the Deponents said, that he had examined the cash and letter books of that time, and that there was no entry whatever in the books in the handwriting of the Defendant, all the entries being in the handwriting of the Plaintiffs and *James Morison*, or the clerk then employed by the firm; and that the cash book and letter book were the only books in which entries were made by the partners themselves. The Deponent denied that *James Morison* or the Plaintiffs knew, shortly after the death of *Thomas Moat*, or before the execution of the deed of February, 1837, that the Defendant was in the possession of the recipe or prescription; and he denied that the Defendant had had the conversations which he alleged with *James Morison*; for the Deponent said, that *James Morison* had a strong personal dislike to the Defendant, and would not meet or converse with him, and that the

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Plaintiffs were not on terms of intimacy with the Defendant, and never discussed matters of business with him, except as to money transactions.

Affidavits of workmen employed by the partnership were also filed on behalf of the Plaintiffs; by which it appeared, that, in the course of the manufacture, some ingredients were introduced at a late stage of the process; that these ingredients had always been kept in a closet in a room set apart for mixing the medicine; that the key of this closet was always kept by *James Morison* or the Plaintiffs; that it was by them, or one of them, the later ingredients were always introduced; and that the Defendant never took part in compounding the medicine. It also appeared, that immediately after the death of *Thomas Moat*, a door, which led from the house in which he resided (and in which the Defendant continued to reside after his death,) to the mixing room, was locked up.

The affidavits differed in their explanations of the deed of February, 1837, and of the covenant in that deed, that the Defendant (as well as the *Morisons*) should not disclose the prescription. The Plaintiffs said, that it was introduced upon the supposition that the power of the Defendant to inspect the books of the partnership might afford him the knowledge of the ingredients, and the quantities of such ingredients used in compounding the medicine. The Defendant said that the covenant against disclosure was entered into upon terms of perfect equality, and for the same reason, by all the parties to the deed, and that the deed was made to settle disputes which had then arisen. The affidavits also differed as to the purpose of and the conclusion to be drawn from the division of the Government stamps, labels, and drugs, at the termination of the partnership.

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Mr. *Bethell* and Mr. *Shapter* for the motion.

The *Solicitor-General* and Mr. *Metcalf* contra.

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Argument.

VICE-CHANCELLOR:—

The Plaintiff's case was rested in argument upon the ground that the Defendant had obtained this secret by breach of faith or of contract on the part of *Thomas Moat*. The subsidiary ground brought forward by the bill, of the Defendant's selling his medicines under the original name and description, was relied upon rather in support of the case of breach of faith and of contract than as a separate and distinct ground for the interference of the Court. Upon that part of the case it is sufficient, therefore, to observe, that there might be difficulty in maintaining it, at all events, until the Plaintiffs should have established their right at law. The true question is, whether, under the circumstances of this case, the Court ought to interpose by injunction, upon the ground of breach of faith or of contract.

Judgment.

That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence,—meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it.

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*Judgment.*

The case of *Green v. Folgham* (a) which was cited for the Plaintiff, where the Court decreed an account against a party to whom a secret of this nature had been entrusted, might perhaps be accounted for upon the ground that the Defendant in that case had expressly admitted himself to be trustee of the secret; but there are other cases in which the Court has interfered without any such admission. In *Williams v. Williams* (b), Lord Eldon, dealing with a case in which a father had divulged a secret like the present to a son, and had delivered to him a stock of medicines, upon the faith of a future partnership being formed between them when the son should come of age, puts the case as to confidence in these terms: "If, on a treaty with a son while an infant, for his becoming a partner when of age, the Plaintiff had, in the confidence of a trust reposed in him, communicated to him this secret, and at the same time given him the possession of the articles mentioned in the bill; and, instead of acting according to his trust, the son had taken to himself the exclusive dominion over these articles, and begun to vend them without permission, it must be said that he had no right in any case so to act, and that he was bound either to abide by or to waive the agreement (c);"—thus laying down the doctrine, that articles delivered over upon the faith and in the confidence of a future arrangement, cannot be used for a purpose different from that for which they were delivered over. In *Fovatt v. Winyard* (d) the same great Judge, upon the express ground of breach of trust and confidence, granted an injunction to restrain the Defendant, who had been the Plaintiff's assistant in his business, from using or communicating receipts which he had surreptitiously copied whilst in the Plaintiff's service. The question again came before him in *Mr. Abernethy's case* (e), in which Mr. Aberne-

(a) 1 S. & S. 398.

(b) 3 Mer. 157.

(c) Id. 159.

(d) 1 J. & W. 394.

(e) *Abernethy v. Hutchinson*, 3 L. J., Chanc., 209, 213, 219.

thy had filed a bill to restrain the publication of the lectures delivered by him at *St. Bartholomew's Hospital*; and I well remember, that, upon the first argument, he refused to grant the injunction on the ground of copyright, Mr. *Abernethy* not being able to swear that the whole lecture was written; but that afterwards, on a second argument, he granted it on the ground of breach of confidence.

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*Judgment.*

We have also Lord *Eldon's* opinion in *Wyatt v. Wilson* (a), referred to by Lord *Cottenham* in *Prince Albert v. Strange* (b); and in the latter case Lord *Cottenham* very decidedly expresses his own opinion upon the question: he says, "This case by no means depends solely upon the question of property; for a breach of trust, confidence, or contract, would of itself entitle the Plaintiff to an injunction. The Plaintiff's affidavits state the private character of the work or composition, and negative any licence or authority for publication,—the gifts of some of the etchings to private friends certainly not implying any such licence or authority,—and state distinctly the belief of the Plaintiff, that the catalogue and the descriptive and other remarks therein contained could not have been compiled or made, except by means of the possession of the several impressions of the said etchings surreptitiously and improperly obtained. To this case no answer is made; the Defendant saying only, that he did not at the time believe that the etchings had been improperly obtained; but not suggesting any mode by which they could have been properly obtained, so as to entitle the possessor to use them for publication. If, then, these compositions were kept private, except as to some given to private friends, and some sent to Mr. *Brown* for the purpose of having impressions taken, the possession of the Defendant or of his intended partner *Judge* must have originated in a breach of trust,

(a) Cited per Lord *Cottenham*, (b) 1 Mac. & G. 25; 1 H. & 1 Mac. & G. 46; 1 H. & T. 25. T. 1.

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*Judgment.*

confidence, or contract in *Brown*, or some person in his employ taking more impressions than were ordered, and retaining the extra number; or in some person to whom copies were given, which is not to be supposed, but which, if the origin of the possession of the Defendant or *Judge*, would be equally a breach of trust, confidence, or contract." The case of *The Duke of Queensberry v. Shebbeare* (a) is then cited; and Lord *Cottenham* proceeds to say, that, upon the evidence, he "was bound to assume that the possession of the etchings by the Defendant or *Judge* had its foundation in a breach of trust, confidence, or contract, as Lord *Eldon* did in the case of Mr. *Abernethy's* lectures; and that, upon that ground, the Plaintiff's title to the injunction was fully established (b)." And he concludes by pointedly approving what fell from Sir *James Wigram* in *Tipping v. Clarke* (c). The Vice-Chancellor *Knight Bruce* appears also to have concurred in opinion with Lord *Cottenham* in *Prince Albert v. Strange* (d). There is therefore the concurrent opinion of Lords *Eldon* and *Cottenham*, and of the Vice-Chancellors *Knight Bruce* and *Wigram* upon the question. By those authorities, in which I most fully concur, and which appear to me to agree in principle with many other cases to be found in the books, I must hold myself to be bound.

It was much pressed in argument, on the part of the Defendant, that the effect of granting an injunction in such a case as the present would be to give the Plaintiffs a better right than that of a patentee; and the case of *Canham v. Jones* (e) was cited on the Defendant's behalf; but what we have to deal with here is, not the right of the Plaintiffs against the world, but their right against the Defendant. It may well be, that the Plaintiffs have no title against the world in general, and may yet have a good

(a) 2 Eden, 329.

(b) 1 Mac. & G. 44; 1 H. & T.

23.

(c) 2 Hare, 383.

(d) 2 De G. & S. 652, 697

(e) 2 V. & B. 218.



title against this Defendant; and the case of *Canham v. Jones* does not appear to me to touch the question. In that case, the allegation was, not that the Defendant was compounding the syrup according to the recipe, but that he did not know the recipe, and was compounding and selling a spurious preparation, falsely describing it under the title by which the true preparation was known, and thereby damaging the character of that preparation. The case, therefore, did not depend upon any breach of confidence,—for there was no confidence reposed,—but depended wholly on a supposed right of property in the medicine; and it is clear, from the judgment, that the distinction between that case and a case like the present had not escaped Sir *Thomas Plumer's* attention; for he observes, that the case then before him was not one “in which the Court has restrained a fraudulent attempt in one man to invade another's property (a).”

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*Judgment.*

Such being the state of the authorities upon this subject, I have now to consider whether the circumstances of this case bring it within the range of those authorities, and whether the Court ought to interfere by injunction; for which purpose it is necessary to examine the case as it has stood at several different periods.

It does not appear to be disputed that *James Morison* was the inventor, and, down to the 23rd of June, 1830, the sole depository of the secret in question. Upon the 23rd of June, 1830, the partnership-deed between him and *Moat*, and the two bonds, were executed; and the first question to be considered is, what was the effect of those instruments? It was contended, on the part of the Defendants, that the effect of them was to constitute the secret an asset of the partnership; but looking at the deed alone, apart from the bonds, I am much disposed to think

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*Judgment.*

Bonds executed by partners to each other, relating to their rights as partners, of the same date as the partnership deed, read with the deed as part of the partnership contract.

it could not have that effect; and taking the deed, as I think it must be taken, in connexion with the bonds, I think it clear that it could not so operate. The question, I apprehend, is one of intention, like the question whether there is a partnership in mines, or only in the minerals which are raised and manufactured by parties working the mines; and this deed, I think, contains indications that the secret was not intended to belong to the partnership; for although it contemplated the introduction of new partners, and expressly provides for the communication of the secret by *James Morison* to *Thomas Moat*, it leaves it to the option of *James Morison* whether he will communicate the secret to persons introduced either by himself or by *Moat*, according as the word "he" in the clause referred to may apply to one or the other (a point which is not material); and it is difficult to conceive, that a secret which one partner had a discretion to withhold from others, could be intended to be a partnership asset. Again, the clause as to accounts seems to look to matters which would properly and without difficulty be the subject of account, and not to such an asset as this secret would be. An account was to be taken upon a new partner coming in. Is it conceivable, that, if this secret had been contemplated as an asset of the partnership, there would have been no provision as to what should then be done respecting it, no provision for valuing it, either then or at the termination of the partnership? But however this question might have stood upon the deed alone, the bonds seem to me to conclude it; for, by *Moat's* bond, he is not to communicate the secret to any person whomsoever; and by *Morison's* bond, he is not to communicate it except to persons whom he or *Moat* may introduce into the partnership, or for the purposes of the foreign trade; and how then could it be in the contemplation of the parties that it should be an asset of the partnership? in which case it would be liable to be sold when the partnership determined. The true effect of these

instruments appears to me to be, that *Morison* reserved to himself the secret against all the world except *Thomas Moat*. *Morison* had power to introduce partners into the concern; *Moat* had the like power with the concurrence of *Morison*, but not otherwise. It was entirely at the option of *Morison* whether he would communicate the secret to any partner introduced either by himself or by *Moat*. *Moat* was also bound not to reveal the secret to any person whatsoever.

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At this stage of the case, therefore, there was, according to the authorities to which I have referred, a perfect right, on the part of *Morison* against *Moat*, to restrain him from divulging the secret. It is to be seen, whether what has since passed has destroyed that right; and if not, whether the Plaintiffs are entitled to enforce it against the Defendant?

The next stage in the case which we have to consider is, the transaction of July and August, 1835. At that time, both the Plaintiffs had become partners in the concern, and the secret was communicated to them. *Moat*, who had been the acting partner, had fallen into bad health; and an agreement was entered into by all parties, that the Defendant, the son of *Moat*, should come into the office as his father's servant; and by deed, dated the 8th of August, 1835, and attested by *Morison*, the Defendant was appointed to be a partner in the business after the death of his father, which occurred a few days afterwards. It is not pretended, that *Morison* ever communicated the secret to the Defendant; and the case does not appear to me to be at all altered by anything which appears on these instruments of 1835; for if I am right in the conclusion at which I have before arrived, the fact of the Defendant's becoming a partner in the concern gave him no right to the knowledge of the secret, and certainly he could derive

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no such right from the agreement, that he should come into the office as the servant of his father. The very language of the agreement, so far as it has any bearing upon the question, leads, I think, to the opposite conclusion; for it is, that he is to transact the business, so far as he is able so to do, not being a partner.

These instruments, however, although nothing material appears upon the face of them, have an important bearing upon the case; for the Defendant says, that, under the provisions of the agreement, he attended the office and gained a knowledge of the ingredients used in the medicines; and that, afterwards, having become a partner on the death of his father, he for two months superintended the business in common with his copartners, and during that time saw the mode and manner of compounding the medicines and the ingredients thereof, and the proportions in which such ingredients were used, and acquired a complete practical knowledge of the mode of compounding and mixing them; and it is insisted, on his part, that he has the right to use that knowledge.

Undoubtedly, if the facts thus stated by the Defendant be proved,—if the Defendant, after he became a partner in the concern, openly took part in compounding the medicines, and used the secret for the purpose,—if, with the knowledge and concurrence of the partners, he was permitted to acquire, and did acquire, a full knowledge of the mode of compounding these medicines and of the secret process in the manufacture of them, it would be difficult for any of those partners afterwards to restrain him from using any knowledge so acquired or any secret so disclosed; they would, I think, in such a state of circumstances, be considered to have waived any right to preserve the secret for their separate benefit. But how does the evidence stand upon these facts?

[His Honor then stated the substance of the affidavits on this point, see pp. 251, 252, supra; and concluded, that, if the Defendant did in fact, after he became a partner in the concern, acquire by practice the knowledge of the mode of mixing the medicines (but which his Honor said he did not believe he did), he acquired that knowledge surreptitiously and without the sanction of his partners.]

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*Judgment.*

The case then in this stage stands thus:—The Defendant admits that the secret was communicated to him by *Thomas Moat*. His allegation, that he acquired a knowledge of it by acting as partner in the concern, is disproved; and it is shewn, that, if he did acquire such knowledge, he did so surreptitiously. The question then is, whether there was an equity against him; and I am of opinion that there was. It was clearly a breach of faith and of contract on the part of *Thomas Moat* to communicate the secret. The Defendant derives under that breach of faith and of contract, and I think he can gain no title by it. In *Green v. Folgham*, upon a trust admitted, an account was decreed against the party to whom the secret had been divulged; and it cannot I think make any difference, whether the trust is admitted or proved; and the cases of *Typing v. Clarke* and *Prince Albert v. Strange* shew, that the equity prevails against parties deriving under the breach of contract or duty.

It might indeed be different, if the Defendant was a purchaser for value of the secret without notice of any obligation affecting it; and the Defendant's case was attempted to be put upon this ground. It was said, that as appointee he came in as purchaser under the deed of the 23rd of June, 1830, and that he had no notice of the bond; but I do not think that this view of the case can avail him, for in whatever character he may stand as appointee, he has no consequential right in the secret. So far as the

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secret is concerned, he is a mere volunteer deriving under a breach of trust or of contract.

There having been then this equity against the Defendant, has it been displaced by what has since occurred? The Defendant contends, that it has; for he says, that the deed of 1837 was entered into with full knowledge, on the part of the Plaintiffs and of *James Morison*, that he had possession of the secret. He has proved I think sufficient to shew, that the fact of his having become a sleeping partner under that deed furnishes no inference against such knowledge, there having been other disputes between the parties. For proof of his knowledge, the Defendant relies on the covenant in the deed against divulging the secret having been made applicable to him. The alleged conversations, and the covenant in the deed, which is of more importance, are, I apprehend, to be regarded as evidence of the knowledge imputed by the Defendant to the Plaintiffs and their father, and to be weighed against the other evidence in the cause; and in determining the weight due to the evidence on the part of the Defendant, it is material to be observed, that he no where states that he told the Plaintiffs and their father that he had possession of the secret, and that he gives no detail of the conversations to which he refers. On the other hand, there is a denial by the Plaintiffs of any such conversations with them, and, to their belief, with *James Morison*; and the grounds of the denial are stated, and are not controverted by the Defendant. There is also the fact, that, if the Plaintiffs and their father had known that the Defendant was in possession of the secret, there appears to be no reason why he should not have participated in the business of mixing the medicines, which I consider it to be proved that he did not; and there is, besides, the conduct of the Defendant at a subsequent period, to which I shall next refer. These facts, in my opinion, far outweigh the Defendant's statement as

to the conversations and the covenant in the deed, which might well be inserted by way of precaution; and I think, therefore, that the Defendant's case upon the deed of 1837 cannot be supported. If the covenant in the deed was inserted as a protection against the Defendant's divulging a knowledge which he was known to have already acquired, surely the fact of his having acquired that knowledge would have been recited in the deed.

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 ———  
*Judgment.*

We come now to the death of *James Morison*, who died in May, 1840. Soon after his death disputes arose between his executors, the widow and administratrix of *Moat*, and the surviving partners; and these disputes were compromised upon the terms, amongst others, of an annuity of 100*l.* being paid to the widow of *Moat* out of the profits of the business, so long as the business continued, and out of the proceeds of the sale of the secret, if it should be sold under the trusts of *Morison's* will. Three deeds were executed for carrying into effect this compromise; and each of those deeds recited the will of *Morison*, with the recital contained in it that he was the inventor and sole proprietor of the medicine, and with the trusts for sale of the secret declared by it; and by one of those deeds the annuity was secured in manner above mentioned. The Defendant was a party to each of these deeds; and it is clear, therefore, that he did not then claim any right or interest in the secret adverse to the title under the will of *Morison*.

Nothing further appears to have occurred until the termination of the partnership, except that, in 1846, the Defendant, through his solicitor, complained of a paper which had been published by the Plaintiffs in *America*, containing a statement, to the effect, that *Thomas Moat* had not revealed the secret, and distinctly stated that he was in possession of it; but nothing ensued upon the com-

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plaint, and, the partnership being then still subsisting, it is difficult to see what could, on either side, have been done upon it. Upon the determination of the partnership on the 25th of March, 1851, the stock was divided; but this was according to the provisions of the partnership articles, and therefore could not affect the rights of either party.

The payment of the expenses of advertisements out of partnership funds, is not necessarily a ground for giving to each partner, at the expiration of the partnership, a continuing share in the advantages of publicity produced by the advertisement; the partnership having had, during its continuance, the benefit of the expenditure.

Effect of notice that a claim will be resisted, in excluding an objection to relief on the ground of laches or acquiescence.

The Defendant, by his affidavit, attempts to set up a further case, upon the ground that great expenses have been incurred in advertisements, and that this will be for the benefit of the Plaintiffs alone, if he be not permitted to carry on the business; but I do not think he can maintain his case upon this ground. It has been the practice of the partnership, and he and his father have had the benefit of it during its subsistence.

The last point urged in the Defendant's behalf was the delay on the part of the Plaintiffs: but I think there has been no such delay as disentitles the Plaintiff to the interposition of the Court; for, at the dissolution of the partnership, the Defendant had distinct notice that his claim would be resisted; and there has since been the question with the Stamp-office—the suit in this Court, and, as it would appear, some negotiation for a compromise; and, besides, he had clearly the right to sell the medicine, and use the labels allotted to him at the termination of the partnership.

Upon the whole, therefore, I am of opinion that the Plaintiffs have made out their case for an injunction. I think, however, the injunction cannot go to the extent which is asked for by the notice of motion. It should, I think, go to the extent of restraining the Defendant from selling, under the title or designation of "Morison's Universal Medicine," or "Morison's Vegetable Universal Medicine," any medicine made or manufactured by him, pro-



ceeding to this extent, not upon the mere use of the name, but because this is clearly the mode in which the Defendant is availing himself of the breach of faith and contract; and upon the authorities, and particularly *Yovatt v. Winyard*, I think it should also go to the extent of restraining the Defendant from making or compounding any medicines according to the secret, and from in any manner using the secret of compounding the medicine. But I cannot grant it to restrain the Defendant "from in any manner using the name of *Morison* in the manufacture or sale of any medicine;" as, in my view of the case, it would very much depend upon the purpose for which and the mode in which the name may be used, whether the injunction would be due or not; nor can I grant it to restrain the communication of the secret, there being no evidence or even allegation of an intention to communicate it.

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—  
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RESTRAIN the Defendant, his agents, &c. from selling, or causing or procuring to be sold, under the title or designation of "*Morison's Universal Medicine*," or "*Morison's Vegetable Universal Medicine*," any medicine made or manufactured by the Defendant, or by or under his order or direction; and restrain the Defendant, his agents, &c. from making or compounding any medicines according to the secret in &c., and from in any manner using the secret of compounding the said medicines, or any part thereof.

*Minute.*

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THE Lords Justices. 19th of December, 1851.—"And whereas Mr. *Solicitor-General* this day moved, and offered divers reasons unto this Court that the said order might be discharged, with costs &c. Whereupon, and upon hearing &c., Their Lordships do order that the injunction granted in this cause be continued; the Plaintiffs by their counsel undertaking to be answerable for any damages or compensation the Court may think fit to award in the event of the injunction being eventually dissolved: the undertaking being considered as given at the hearing of the original motion."

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On the 22nd of January, 1852, the Defendant submitted to an order making the injunction perpetual.

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August 6th.

LESLIE v. TOMPSON.

## A SPECIAL CASE.

After a sale by auction of a messuage and lands, one of the conditions of which was, that any mistake or error in the description of the property, or any other error in the particulars, should not annul the sale, but (except where otherwise provided for by the conditions) a compensation should be given or taken, to be settled by two referees, or an umpire,—it was found that one of the lots contained about twenty acres more, and another about ten acres less than the quantity of land described in the particulars:—*Held*, that, upon the construction of the condition, the mistake or error thereby contemplated was such a mistake or error as would annul the contract.

In August, 1850, certain hereditaments, situated at *Iver*, belonging to the Plaintiffs, were put up for sale by auction in several lots, subject to certain particulars and conditions of sale, with a plan annexed thereto, denoting the several lots by different colours; printed copies of which particulars were delivered to the Defendant and others a few days before the sale. The Defendant was declared the purchaser of Lot 1 at the auction, at the price of 2800*l*. He also afterwards became the purchaser of Lots 2, 3, and 4.

Lot 1 was thus described by the particulars:—"A country residence, park, and grounds, called 'Dromenagh Lodge.' The well-timbered park is inclosed by thriving plantations and strong oak palings. There is a neat lodge-entrance, containing a neat sitting-room, three bed-rooms, with good garden, and strong entrance-gate. The long coppice is a gradually sloping wood to a pure running stream abundantly supplied with fish, and is studded with numerous rustic lodges and seats. This lot comprises about 70*A*. 24*P*., divided in the following manner:—

That the excess of the quantity of land in one of the lots, and the deficiency in the other, were both subjects of compensation within the condition; and that the Court would, if necessary, refer it to the Master to settle the amount of such compensation, notwithstanding that, from the variety in the nature of the different portions of the land in which the variations occurred, there was no uniform standard for computing such amount.

That, whether a vendor could, or could not, in equity be relieved, on the ground of mistake, from a contract for the sale of lands inaccurately described as to quantity, and which description had been prepared by his solicitor from former particulars and conditions relating to the same property, drawn up by another solicitor on the report of a surveyor;—equity would not, in such circumstances, enforce the contract against the vendor, unless the case should be one for compensation, and the purchaser should submit to make such compensation.

NO ON PLAN.

QUANTITY.

	A.	R.	P.
1. Residence, office, garden, lawn, and fish-pond . . . . .	3	0	30
2. Stabling, yards, and kitchen-garden . . . . .	2	0	30
3. Lodge and park . . . . .	18	0	4
4. Long coppice . . . . .	46	3	0

Total acres more or less 70 0 24 "

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The Lots 2, 3, and 4, were described in the particulars as comprising certain messuages, out-buildings, &c., together with certain quantities of arable, pasture, meadow, and wood lands, amounting in the aggregate to 321A. 2R. 30P., more or less.

The 11th condition of sale provided, that, if any mistake or error should appear in the description of the property, or any error whatever appear in the annexed particulars, such mistake or error should not annul the sale; but, except where otherwise provided for by the conditions, a compensation or equivalent should be given or taken, as the case might require, to be settled by two referees, or an umpire to be nominated by them before entering on the business; one referee to be nominated by each party within seven days after the discovery of the error and notice thereof given to the other party; and, in case either party should refuse or neglect to name a referee within the time appointed, the referee of the other party should alone make a final decision.

Some time after the sale had taken place, it was found that Lot 1 comprised 89A. 29P., instead of 70A. 24P.; and that the Lots 2, 3, and 4, comprised in the aggregate 310A. 3R. 18P., instead of 321A. 2R. 30P.

The whole of Lot 1, with the exception of the stabling and kitchen-garden, which were separated by a road from

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 —  
*Statement.*

the residue of the lot, was in a ring fence, bounded on the south, south-west, and south-east sides by roads and wooden palings, on the western side by a hedge or fence, and on the north and north-east by the stream or brook.

The quantities of the lands assigned to the different lots were inserted in the particulars under a mistake. In the preparation of such particulars, and for the purpose of describing the property therein, the Plaintiffs' solicitor had referred to and taken the several descriptions from printed particulars of the estate, prepared by another solicitor on a former occasion, and from a surveyor's report made on such occasion, which he believed to be correct, and therefore relied upon.

The Plaintiffs claimed an increased amount of purchase-money, to be paid to them by way of compensation for the extra quantity of land comprised in Lot 1; and offered to allow compensation to the Defendant for the deficiency on the other lots; and the question submitted for the judgment of the Court was, whether the Plaintiffs were entitled to any compensation for such excess of acreage in Lot 1, above the quantity stated in the particulars, they (in the event of being so entitled) allowing compensation to the Defendant for the deficiency existing in the acreage of Lots, 2, 3, and 4.

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*Argument.*  
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Mr. *Malins* and Mr. *Prior* for the Plaintiffs.—The mistake brings the case expressly within the 11th condition. But the case would have been one for compensation if there had been no such condition. The presumption would be, that the price was fixed with regard to the quantity, and the purchaser is entitled to have what the vendor can give, with a proportionate abatement: *Hill v. Buckley* (a). The words "more or less" do not relieve a

vendor from the necessity of making such an abatement, where the quantity proves to be deficient and the deficiency is at all considerable, (as two acres upon a hundred, *Gell v. Watson* (a)): *Portman v. Mill* (b). As the purchaser might have required compensation for a deficiency, so may the vendor for an excess.

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*Argument*

The *Solicitor-General* and Mr. *Prendergast* for the Defendant.

The question depends upon the substance of the contract. In the cases referred to, acreage was the principal consideration; in the present case, it is clear that the mere extent in acreage was a subordinate thing. The contract is for an entire and ornamental estate or farm, sufficiently defined by metes and bounds, in which the superficial contents are but incidentally mentioned. It is clear, that the parties intended to deal with the whole estate, and not with a part of it; and where the whole was intended to be sold, the whole must pass: the Plaintiffs cannot have a specific performance of the contract with a variation: *Okill v. Whittaker* (c). Taking it, however, that the acreage is to be regarded, as to some extent, an ingredient in the terms of the contract, still the vendors have not bound themselves to any precise quantity, and they cannot therefore more strictly bind the purchaser. The words "more or less," in such a case, would cover a difference of ten acres in four hundred. In *Gell v. Watson*, two closes, described as eight acres, fell short by two, and this entitled the purchaser to compensation. It does not appear that the case would have been so decided, if the deficiency had been on the aggregate: *Winch v. Winchester* (d). But it

(a) Nov. 16th, 1825. 1 Sugd. V. & P. 10th edit. p. 529; 11th edit. p. 230.

(b) 2 Russ. 570.

(c) 2 Ph. 338, 340—Per Lord Cottenham.

(d) 1 V. & B. 375.

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*Argument.*

does not follow, that, wherever a purchaser might claim compensation for a deficiency, a vendor is entitled to compensation if there be an excess. It is the duty of the vendor to describe accurately the property which he offers for sale; and it is not a mere negligence on his part which can be treated as a mistake within the condition: *Martin v. Cotter* (a), *Higginson v. Clowes* (b). Another ground on which the Court will refuse to treat the case as one for compensation is, that there is no measure or standard for fixing its amount. There is nothing on the case to shew, and the Plaintiffs therefore have not shewn, whether the excess beyond the stated admeasurement arises in the gardens, the park, or the coppice, or what portions of it appertain to such respective parts: *Sherwood v. Robins* (c), *Lord Brooke v. Rounthwaite* (d).

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VICE-CHANCELLOR:—

In this case, there has been a sale of property in four lots. In the particulars of Lot 1, there has been an understatement of about twenty acres in the quantity of the property which it comprised; and in Lots 2, 3, and 4, there has been an over-statement by about ten acres. The question which I have to consider is, whether the purchaser is bound to pay compensation for the surplus in Lot 1, and to receive compensation for the deficiency in the other lots.

The conditions of sale contain, amongst others, a provision, that mistake or error in the description of the property in the particulars shall be made the subject of compensation. [His Honour read the 11th Condition (e).]

(a) 3 J. & L. 496, 512—Per *Tenterden*; S. C., 3 Car. & Pay. 339.  
 Sir *Edward Sugden*, L. C.

(b) 15 Ves. 516, 525.

(d) 5 Hare, 298.

(c) 1 Mo. & Mal. 194—Per Lord

(e) *Supra*, p. 269.

I think the mistake or error meant to be referred to by that condition is such a mistake or error as, on the part of the vendors, would vitiate or annul the contract for sale. The question, then, to be considered is, whether, in this state of circumstances, the vendors could on bill filed have been relieved from their contract on the ground of the mistake they have made in the particulars, or whether the purchaser could have enforced the contract against the vendors. I entertain some doubt, whether, under the circumstances of this case, the vendors could have been relieved, if they had filed their bill to have the contract delivered up to be cancelled. I am rather disposed to think, that, under the circumstances stated on the special case, they might have been relieved; for it appears upon the special case, that the particulars of sale were prepared from some previous conditions and particulars of sale, and from the report of a surveyor prepared on a former occasion, and which particulars and report were erroneous. I am disposed to think, therefore, that, as the vendors have in preparing the particulars in this case proceeded on former conditions of sale drawn up on the report of a surveyor, which is incorrect, and have therefore entered into the contract under a mistaken conception of the amount of property comprised in the particulars, they would be entitled to relief. But whether that would be so or not, I am strongly of opinion, that the purchaser could not enforce the contract in the face of that mistake, which is proved to have existed, unless, indeed, he were willing to adopt the condition by which compensation is prescribed for any excess in the quantity of land taken.

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 Judgment.

One argument put by Mr. *Prendergast* appeared to me at first to be entitled to weight. It was, that the vendors did not intend to sell the lot by measurement, but that they

The actual designation, in the particulars of the property offered for sale, of the number

of acres contained in a lot—*Held* to negative the presumption of any intention on the part of the vendor to sell the estate in the lump.

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TOMPSON.*Judgment.*

meant to sell the lot in the mass or lump. It was upon that point that I felt some hesitation during the discussion before me. The conclusion, however, to which I have arrived is this, that the actual designation of the number of acres contained in the lot negatives the presumption of any intention on the part of the vendors to sell in the lump.

Another argument urged on behalf of the purchaser was, that, even if the Court should be of opinion that this is a case in which, under the contract, the purchaser is bound to make compensation; yet that, in the circumstances which appear, there are no means of estimating the amount of such compensation. That, however, is pointed out by the condition of sale, which provides that the amount of compensation shall be settled by arbitration: and, if the parties are unable to procure the amount of the compensation to be settled by arbitration according to the provisions of the contract, this Court will ascertain it by a reference to the Master.

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DECLARE, that the purchaser is bound to make compensation for the extra quantity of land comprised in Lot 1, and is entitled to receive compensation in respect of the deficiency of the quantity in Lots 2, 3 and 4. No costs on either side.



1851.

## ANDERSON v. GUICHARD.

July 24th.

THE claim was filed for the appointment of a receiver of the personal estate of *W. Anderson*, pendente lite. The Plaintiff was sole executor and residuary legatee under a will made in *England*, dated the 24th of June, 1843; and the Defendants were the executor and sole legatee under a will made in *France*, and dated the 26th of January, 1848; and the right to probate was in contest in the Ecclesiastical Court.

It is not necessary to bring to a hearing a suit for the appointment of a receiver pendente lite.

It was referred to the Master to appoint a receiver; and the monies paid in by the receiver were directed to be invested and accumulated. On the 21st of June, 1851, the Master reported a balance of 206*l.* 11*s.* 4*d.* to be due from the receiver. The claim was then set down for hearing.

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Mr. *Surrage* for the Plaintiff.

Mr. *Elderton* for the Defendants.

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The VICE-CHANCELLOR inquired for what reason the case was brought to a hearing; and observed, that he did not know of any instance of a case of this kind having been brought to a hearing in a suit by bill. There was at present no personal representative of the deceased person, whose estate was the subject of the proceeding.

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No instance of such a case was referred to by counsel; but the Plaintiff and Defendants desiring that an order should be made, the Court directed, that the receiver

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should be continued, and the costs of the Plaintiff and Defendants taxed and paid out of the fund in Court, and the residue invested and accumulated, subject to the further order of this Court.

July 31st.

GOLDER v. GOLDER.

A creditors' suit stayed, on the application of the executors, after a decree in a suit by residuary legatees for the administration of the same estate, notwithstanding there might be inquiries directed in the legatees' suit, which would not have been necessary in the creditors' suit; it being competent to the Master to make a separate report, and thereby prevent the payment of the creditors from being delayed by the business of the ultimate administration of the estate.

A MOTION by two of the Defendants in the suit, who were the executors of the testator *Charles Golder*, to stay proceedings in a claim (*Lucas v. Golder*) by a creditor of the testator, for the administration of his personal estate, and (if that should be insufficient) of his real estate, on behalf of the Plaintiff in the claim and all other the unsatisfied creditors of the testator.

A decree was made in the cause on the 18th of July, 1851. The Plaintiffs were some of the residuary legatees, and the Defendants were the executors, the heir at law, and the remainder of the residuary legatees, and next of kin. Proof was made by affidavit, that the proper parties were before the Court; and the decree was prefaced as follows:—"And it appearing to the satisfaction of this Court, that all the children of *Charles Golder*, the testator, in &c., who were living at the time of his decease, and his heir at law, and the assignees of such heir at law, as well as all those who were next of kin of the said testator at the time of his death according to the statutes made for the distribution of intestates' estates and effects are before the Court, and are parties to this suit; and the will of the said testator being admitted by *William Rolfe Golder*, the said heir at law, and his assignees: This Court doth order and declare, that the trusts of such will be carried into effect," &c. And the Court proceeded to direct an account of the personal estate of the testator, not specifically bequeathed,

come to the hands of the executors, distinguishing the receipts and payments of one of them before and since his bankruptcy, what personal estate he was entitled to, whether at the time of his death he was in partnership with any persons and whom, and his interest therein, and under what circumstances the business had been carried on, and whether it was fit and proper that any thing and what should be done in respect thereof.—And in taking the accounts, the Master was directed to make all proper allowances to the Defendants in respect of anything done by them in or about the businesses of the testator, in partnership or otherwise. And an account was directed of what personal estate was outstanding, of the debts, funeral and testamentary expenses, legacies, and annuities given by the will. And it was ordered, that the personal estate should be applied in a due course of administration. The decree then proceeded to direct inquiries as to the freehold, copyhold, and leasehold estate,—inquiries as to the covenants binding on the testator in respect of certain building land at Folkstone,—accounts of the rents and profits of the freehold, copyhold, and leasehold estate received by the Defendants; with a direction to appoint one of the executors and devisees receiver, without salary and without security; and the receiver was empowered, with the approbation of the Master, to sell certain shares of ships or vessels belonging to the estate.

The claim (*Lucas v. Golder*) was set down for hearing after notice of the decree. The affidavit of the solicitor of the Plaintiff in the claim, in opposition to the motion, stated, that he believed the interests of the creditors would be better protected by the decree if made in the claim, than under the decree made in the cause.

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 }  
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 —  
*Statement.*

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Mr. Bethell and Mr. Giffard for the motion.

*Argument.*

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*Argument.*

Mr. *Rolt* and Mr. *W. Morris*, for the Plaintiffs in the claim, contended, that the creditors had no concern with many of the inquiries directed by the decree, which were solely for the benefit of the parties interested in the estate. The objects of creditors' and legatees' suits were distinct (a). The creditors ought not to be delayed by inquiries with which they had nothing to do, and the prosecution of which might prolong the cause for an indefinite time, and exhaust the estate. In *The Earl of Portarlington v. Damer* (b), the creditor had sought satisfaction of his debt, pursuant to the trusts of the will, of which trusts the other suit also sought the execution. In this case, the creditors have no interest in common with the residuary legatees in many of the inquiries which are directed: *Umacke v. Rochfort* (c).

*Judgment.*  
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The VICE-CHANCELLOR said, that the order to stay the proceedings in one suit after the decree in the other was of course. The accounts and inquiries which had been directed, might have been necessary in the claim by the creditor, and the Master might make a separate report of debts, so that the creditors should not be delayed by the proceedings, which were merely administrative and for the benefit of the estate; and the Court must assume that the Master would properly exercise his discretion on that point.

(a) See *Collinson v. Ballard*, 2 Hare, 119.

(b) 2 Ph. 262.

(c) 1 Moll. 216. See the case of an application to stay a creditor, where the right of the creditor to go in under the decree was not absolute, but was conditional

only: *Ranken v. Harwood, Ranken v. Boulton*, 5 Hare, 215. In the principal case, the preliminary proof of the perfect constitution of the suit by the presence of all necessary parties, had enabled the Court to make an unconditional decree.

STAY proceedings in the claim of *Lucas v. Golder*, and let the Defendants, the executors, pay (a) to the Plaintiff *Lucas* their costs of the claim up to the 18th of July, 1851, being the day on which they had notice of the decree in this cause, to be taxed &c.

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Minute.

(a) This order was made after giving the executors an opportunity of shewing, by affidavit, that they had no assets; in which case the order would have been, that the Plaintiffs should be at liberty to add their costs to their claim, and go in for payment un-

der the decree in the cause. See *West v. Swinburne*, before the Vice-Chancellor *Knight Bruce*, 19th November, 1850; Reported 19 L. J., N. S., Chanc., 81; in which case the practice was certified by the officers of the Court.

LOVEGROVE v. COOPER.

July 31st.

MR. V. NEALE applied to open the biddings.

Mr. *Kenyon Parker* objected, that there was no report of the purchase.

No order will be made to open biddings, until the report of the purchase has been made.

The VICE-CHANCELLOR said, he had no authority to open the biddings until the report of the purchase had been made.

Motion refused, with costs.

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July 18th.

Questions on which it is proper for the Court of Chancery to send cases for the opinion of Courts of common law, or to seek the assistance of the Judges of such Courts, under the statutes 13 & 14 Vict. c. 35, s. 14; and 14 & 15 Vict. c. 83, s. 8, or otherwise.

## FALKNER v. GRACE.

A SPECIAL CASE.—*James Eykyn*, by his will, dated in 1824, after directing his debts to be paid out of his personal estate, devised and bequeathed his freehold, copyhold, and real and personal estate to the Defendants, *Grace* and *Burbidge*, their heirs, executors, &c., upon trust, to pay the rents, issues, and profits of his real estate, and the dividends, interest, and proceeds of his personal estate, unto his wife *Charlotte Eykyn*, for her life; and after her decease to pay one moiety of such rents, interest, &c., to his brother *William*, for his life; and out of the other moiety to pay an annuity of 100*l.* to *Martha Thomason*, for her life; and subject thereto to pay the residue of the said rents, interest, &c., as his wife should by deed or will appoint. And the testator directed, that his trustees should stand seised and possessed of all the said real and personal estate, upon trust, to convey, assign, and assure the same, as his said wife should by deed or will appoint.

The testator died in January, 1839.

*Charlotte Eykyn*, the widow, by deed poll of appointment, dated in July, 1839, directed that the trustees should stand seised and possessed of the said freehold and copyhold and personal estate and effects, upon trust, to raise and pay, by and out of the said freehold and copyhold and personal estate and effects, two sums of 1500*l.* each, in trust for *James Browning*, *Hardwick Browning*, and *Elizabeth Emmett*, in equal shares as tenants in common. And she thereby directed the trustees to pay one of such sums at the end of twelve months from her decease; and empowered them to raise and pay the same by mortgage of the moiety of the several freehold, copyhold, and personal estate and effects, which should then have fallen into pos-

session; and she directed the other sum to carry interest from the decease of the survivor of them, herself and *William*, the brother of the testator, and to be paid at or upon the expiration of twelve months after that event; and she empowered the trustees for that purpose, and for the purpose of raising any part of the first sum not then raised and paid, to mortgage or sell the said several freehold and copyhold and personal estate and effects, or any part thereof, making provision for the annuity payable to *Martha Thomason*; and, subject to such sums and interest, she appointed that the said real and personal estate should be held and remain in trust for *Elizabeth Bennett* and such of the children of *Richard Eykyn* as should be living at the time of her, *Charlotte Eykyn's*, decease, in equal shares, as tenants in common and not as joint tenants; but, if any of such children should die under twenty-one, then the shares or share of such of them so dying should be in trust for the survivors or survivor and others or other of them the said children of the said *Richard Eykyn* and the said *Elizabeth Bennett*, living at the decease of the said *Charlotte Eykyn*, and his, her, or their respective heirs, executors, administrators, and assigns respectively, in equal shares and proportions (if more than one), and their respective heirs, executors, administrators, and assigns, as tenants in common and not as joint tenants, so and in such manner that the child or each of the children (if more than one) of the said *Richard Eykyn* attaining twenty-one and surviving the said *Charlotte Eykyn* and the said *Elizabeth Bennett*, in case she survived the said *Charlotte Eykyn*, should take equally per capita.

*Elizabeth Bennett* attained twenty-one in 1836, and died in 1846, intestate, and without having had any child, leaving *Joshua Bennett* her husband surviving. *Charlotte Eykin* survived *William*, the testator's brother, and died

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## FALKNER v. GRACE.

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session; and she directed the other sum to carry interest from the decease of the survivor of them, herself and *William*, the brother of the testator, and to be paid at or upon the expiration of twelve months after that event; and she empowered the trustees for that purpose, and for the purpose of raising any part of the first sum not then raised and paid, to mortgage or sell the said several freehold and copyhold and personal estate and effects, or any part thereof, making provision for the annuity payable to *Martha Thomason*; and, subject to such sums and interest, she appointed that the said real and personal estate should be held and remain in trust for *Elizabeth Bennett* and such of the children of *Richard Eykyn* as should be living at the time of her, *Charlotte Eykyn's*, decease, in equal shares, as tenants in common and not as joint tenants; but, if any of such children should die under twenty-one, then the shares or share of such of them so dying should be in trust for the survivors or survivor and others or other of them the said children of the said *Richard Eykyn* and the said *Elizabeth Bennett*, living at the decease of the said *Charlotte Eykyn*, and his, her, or their respective heirs, executors, administrators, and assigns respectively, in equal shares and proportions (if more than one), and their respective heirs, executors, administrators, and assigns, as tenants in common and not as joint tenants, so and in such manner that the child or each of the children (if more than one) of the said *Richard Eykyn* attaining twenty-one and surviving the said *Charlotte Eykyn* and the said *Elizabeth Bennett*, in case she survived the said *Charlotte Eykyn*, should take equally per capita.

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in 1849. Nine of the children of *Richard Eykyn* survived *Charlotte Eykyn*.

The real and personal estate of the testator *James Eykyn*, subject to the appointment, consisted of a freehold and copyhold estate at *Palmer's Green*, (which was, after the death of *Charlotte Eykyn*, sold with the consent of all parties,) and several sums of stock in the public funds, London Dock Stock, and shares in public companies.

An annuity bequeathed by will, and directed to be paid out of a moiety of the rents, issues, profits, dividends, interest, and proceeds of the real and personal estate of the testator, after the expiration of a life-interest therein, —*Held* not to be primarily payable out of the personal estate of the testator, but to be apportionable between the real and personal estates.

The questions submitted to the Court were—First, whether *Elizabeth Bennett*, notwithstanding her death in the lifetime of *Charlotte Eykyn*, took any share in the real or personal estate under the appointment of the 19th of July, 1839; or whether the nine children of *Richard Eykyn*, who survived *Charlotte Eykyn*, were exclusively entitled thereto. And secondly, whether the two sums of 1500*l.*, and the annuity of 100*l.* to *Martha Thomason*, should be paid out of the personal estate, or wholly or in part out of the real estate.

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The case was argued by

Mr. *Rolt* and Mr. *Lewin* for the Plaintiff; and

A legacy directed by an appointment in pursuance of a will to be raised by mortgage of the moiety of the residuary real and personal estate, on the expiration of a life-interest in such moiety, and the residue of such legacy, and another legacy directed to be raised and paid by mortgage or sale of the whole or any part of the real and personal estate, on the expiration of another life-interest, —*Held* not to be charges primarily payable out of the personal estate, but to be apportionable between the real and personal estate.

A gift of residuary estate to *A.*, and such of the children of *B.* as should be living at the death of *C.*, their respective heirs, executors, &c., in equal shares, as tenants in common, and not as joint tenants; but if any such children should die under twenty-one, their shares to be in trust for the survivor or survivors, and other or others of them the said children of *B.* and the said *A.* living at the decease of *C.*, and his and their respective heirs, executors, &c., in equal shares, as tenants in common, and not as joint tenants, so and in such manner that the children of *B.* attaining twenty-one and surviving *C.* and the said *A.*, in case *A.* survive *C.*, should take equally per capita:—*Held*, that *A.*, surviving the testator, and dying in the lifetime of *C.*, took, nevertheless, with the children of *B.* who survived *C.* a vested share in the residuary estate.

The *Solicitor-General*, Mr. *Chandless*, Mr. *Basalgette*, and Mr. *Shebbeare*, for the several Defendants.

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Upon the second question, *Boughton v. Boughton (a)* was cited.

The VICE-CHANCELLOR held—First, that the real and personal estates were divisible into ten shares; and that *Elizabeth Bennett* took a vested interest in one-tenth of such shares, (her personal representatives taking one-tenth of the personalty, and her heir at law one-tenth of the realty). And secondly, (distinguishing the case from *Boughton v. Boughton*), that the annuity of 100*l.* a year and the two sums of 1500*l.* were apportionable pro rata between the real and personal estates. The costs were ordered to be apportioned in like manner.

Mr. *Chandless*, for the devisee of the heir at law of *Elizabeth Bennett*, asked, that a case on the latter point might be sent for the opinion of a Court of common law, under the statute (13 & 14 Vict. c. 35, s. 14).

VICE-CHANCELLOR:—

This does not appear to me to be a case which this Court should send for the opinion of a Court of law. In my opinion, it is desirable for this Court to avoid, as far as possible, sending cases for the opinion of another Court. I think the aid of a Court of law, or the assistance of the Judges of that Court (*b*), may be properly resorted to in cases where the question is one of importance to

Judgment.

(a) 1 H. L. Cas. 406, 437. See (b) See stat. 14 & 15 Vict. c. 1 Coll. 26, nom. *Boughton v. James, S. C.* 83, s. 8.

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the general law of the country, or where the decision may have an extensive operation in a public point of view; but my opinion is, that this Court ought not to require the assistance of another Court on questions which turn merely on the construction of particular instruments.

June 24th,  
 25th, & 28th.  
 July 1st.

THE MANCHESTER, SHEFFIELD, AND LINCOLN-  
 SHIRE RAILWAY COMPANY v. THE GREAT  
 NORTHERN RAILWAY COMPANY.

A question of general law, arising out of circumstances which are likely to occur in other cases, and the decision of which might affect the rights of other persons, is a case in which this Court may properly seek the opinion of a Court of law.

A Railway Company having acquired a legal right to and possession of land, and constructed their Railway over the same under the provisions of their Act, another Railway Company, to whom the legislature had given power to purchase the same land for the purposes of their undertaking, was restrained by injunction from exercising such power pending the trial of the legal question of the effect of such conflicting powers.

As to the effect of two Acts of Parliament conferring on different Companies the right of purchasing compulsorily, according to the provisions of the Lands Clauses Consolidation Act, the same plot of land—*Quere.*

THE Defendants were empowered by the "Act for making a railway from *London to York*, with branches therefrom, providing, for the counties of *Hertford, Bedford, Huntingdon, Northampton, Rutland, Nottingham*, and the three divisions of the county of *Lincoln*, a railway communication with *London* and *York*, to be called 'The Great Northern Railway' (a)," which received the royal assent on the 26th of June, 1846, and incorporated, in the usual way, the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, to purchase compulsorily a piece of land belonging to the *West Retford Hospital*, for the purposes of the Railway. The Plaintiffs, by the "Act for making a Railway from the proposed *Sheffield and Lincolnshire Junction Railway* to the city of *Lincoln* (b)," which

(a) Stat. 9 & 10 Vict. c. lxxi.  
 Local and Personal.

(b) Stat. 9 & 10 Vict. c. cccxix.  
 Local and Personal.

received the royal assent on the 3rd of August, 1846, and incorporated the same general Acts, were empowered to purchase compulsorily the same piece of land, which, in pursuance of such power, the Plaintiffs accordingly purchased and took in the month of May, 1847. The Plaintiffs constructed their Railway over the piece of land which they had so taken, and the Railway was completed, and opened for traffic in June, 1849.

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Statement.

In May, 1851, the Defendants gave notice to the Plaintiffs, that, in pursuance of the provisions contained in the Great Northern Railway Act, 1846 (the first Act), and in the Acts incorporated therewith, they required to purchase and take the lands and hereditaments described in the schedule thereto, (being the piece of land taken by the Plaintiffs, and which now formed part of the site of their Railway), and requiring to be furnished, within twenty-one days, with the particulars of the estate and claim of the Plaintiffs, and stating in the usual form that they were willing to treat for the purchase of the same, and for the compensation to be made to the Plaintiffs. The Defendants added—" And the said Company do hereby further give you notice, that, although they require the said land and hereditaments for the purpose of enabling them to construct their Railway and works across the line and a siding of the *Manchester, Sheffield, and Lincolnshire* Railway, in the parish of *Ordsall*, in the county of *Nottingham*, it will not be necessary for the said Great Northern Railway Company to purchase the said lands and hereditaments coloured blue on the plan hereto annexed, and containing eleven perches, provided they have the free and uninterrupted use thereof for the purpose of their said Railway and works; but they are nevertheless willing either to purchase the same, or to acquire a joint tenancy thereof with you the said *Manchester, Sheffield, and Lincolnshire* Railway Company, if so required by you; and the said

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Great Northern Railway Company hereby further give you notice, that it has been agreed between the engineers of the respective Companies, and on their behalf, that the crossing required to be made for the purposes of the Great Northern Railway Company, shall be laid by the engineer of the said *Manchester, Sheffield, and Lincolnshire* Railway Company, for and at the expense of the said Great Northern Railway Company, and which agreement the said Great Northern Railway Company hereby ratifies."

To this notice, the Plaintiffs replied, that they had no power to comply therewith; and on the 3rd of June, 1851, the Defendants gave the Plaintiffs notice of their intention to summon a jury to assess the purchase-money and compensation for the land in question.

The bill was thereupon filed, and a motion made for an injunction to restrain the Defendants from taking any further proceedings under their aforesaid notices, and from doing, or causing or permitting to be done, any act, matter, or thing, in or towards or for the purpose of compelling the Plaintiffs to sell or convey the said lands, or any part thereof, to the Great Northern Railway Company, or in or towards or for the purpose of obtaining possession of the said land or any part thereof, and from in any way entering upon the said land or any part thereof, and from interrupting or in any way interfering with the Plaintiffs' possession of the said land, and their free and uninterrupted use thereof.

The affidavits went to the circumstances which had taken place between the parties, and to the question of the relative inconvenience which would be occasioned by granting or refusing the injunction.

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Mr. *Bethell*, Mr. *Malins*, and Mr. *G. L. Russell* for the Plaintiffs.

Mr. *Rolt* and Mr. *Denison* for the Defendants, contended, first, that the original right to purchase the land in question was vested in the Defendants, and that the statute under which the Plaintiffs claimed was made subject to that right; that a special statute does not derogate from a special statute without express words of abrogation (a). Secondly, that the contest was entirely as to the legal rights of the parties, without any case for equitable interference on the behalf of the one rather than of the other. The Act of Parliament, under which the Defendants claimed a right to purchase the land in question, either gave them that right or it did not. If the Act conferred the right, what ground was there for equitable interposition? If it did not confer the right, where was the mischief? The proceedings of the Defendants would, in that case, be nugatory, and would give them no title.

Other arguments, founded thirdly on an alleged agreement between the two Companies, and fourthly on the comparative degree of inconvenience which the Defendants would suffer if the injunction should be granted, it is not necessary to recapitulate.

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VICE-CHANCELLOR:—

It has hardly been denied in the argument of this case, that where a Railway Company is about to take lands, not authorised to be taken under the summary powers given to them by the legislature, the case is a proper one for the interference of this Court by injunction. It has been said, however, that the injunction asked for by this motion ought not to be granted, on several grounds.

(a) Jenk. Cent. Rep. 3rd edit. (Barlow), Case XI. See *Dawson v. Paver*, 5 Hare, 415.

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*Judgment.*

As to the first point, that the Plaintiffs have taken their powers subject to the previously acquired right of the Defendants, the question is purely legal. It is a question of great importance to the parties, and not free from difficulty; the question too is drawn into equity only by the necessity of interference to preserve the legal right; and it is a case on which I do not hesitate to desire the opinion of a Court of law, more especially as what has happened here may have happened in other cases. The rights of other parties may be affected by the decision; and the case appears to involve a general question of law, of no little consequence,—what is the effect of two Acts of Parliament relating to a special subject and conferring the same right on different parties?

On the second point, I feel no difficulty; I think there is a sufficient case suggested for equitable interference. It is no light matter to change or interfere with the legal possession in a case of this nature.

[His Honor then disposed of the third point, as to the special agreement, holding, that it was not tenable as an answer to the application.]

These points being disposed of, the fourth and only question which remains is, what is to be done in the meantime, and having regard to the legal interest being, as I think it undoubtedly is, in the Plaintiffs. I do not think the Defendants have made out such a case as would justify this Court in controlling or interfering with it.

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Injunction granted. The Defendants, if they desired it, to take a case for the opinion of a Court of law, on the question of their title to purchase the land, and cross the Plaintiffs' Railway on a level.



1851.

IN THE MATTER OF WILLIAM HENRY BURT, AN INFANT, *July 11th.*  
AND OF THE TRUSTEE ACT, 1850.

**JOHN YOUNGS** and *William Burt*, the father of the infant *William Henry Burt*, were partners, as brewers, at *Norwich*. The terms of the partnership were expressed in an indenture, dated in April, 1841, and made between the said partners. It was thereby agreed, that the partnership should continue for a term of ten years, from the 1st of October, 1840; that the capital should be 9000*l.*, one-third of which was to be brought in by *John Youngs* and two-thirds by *William Burt*, in which proportions they should be interested in the said copartnership; and the indenture provided, that in case *William Burt* should happen to die before the expiration of the partnership term of ten years and in the lifetime of *John Youngs*, then and in such case the partnership business should be carried on by the executors or administrators of *William Burt* in conjunction with *John Youngs*, for all the then residue of the said term, upon such terms, under such conditions, and in such manner and form, to all intents and purposes, upon and subject to which *William Burt* would, if living, have been entitled to carry on or concur in carrying on the same, save and except only, that in such case the said business should be under the sole management and direction of *John Youngs*, without any interference or control, or right of interference or control, by or on the part of the executors or administrators of *William Burt*, but with such powers as therein mentioned: Provided also, that if either of them the said *John Youngs* and *William Burt* should happen to die before, and the other of them should be living at the expiration of, the said term of ten years, then and in such case the surviving partner, who should be living at such period, should have the option to be at liber-

Two partners in a brewery, part of the property of which consisted of freehold and copyhold estates, covenanted that the survivor should have the option of purchasing the share of the deceased partner in the property of the partnership, at a valuation; and the survivor accordingly exercised such option, and paid to the executors of the deceased partner the amount at which his share was valued. The share of the deceased partner and his legal estate in part of the freehold and copyhold estates of the partnership descended or became vested in his infant heir; but the Court refused, upon petition or motion under the Trustee Act, 1850, without suit, to declare the infant heir a trustee for the surviving partner.

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1850.

*Statement.*

ty, at any time within or after the expiration of the said term of ten years, to purchase and take the share of his deceased partner of and in the estate, stock, property, and effects then due and belonging to the copartnership, at a valuation to be made of the same, within twenty one days after the expiration of the said term, by three indifferent persons, one to be chosen by the surviving partner, another by the executors or administrators of such deceased partner, and the third by the persons so first chosen; and the decision of such three persons, or any two of them, touching the value of the said share of the premises, should be absolutely binding and conclusive, and the heirs, executors, or administrators of the partner so dying should, within ten days next after such valuation should be completed, on receiving from the surviving partner the sum of money which should be determined as aforesaid to be the value of the share aforesaid, well and sufficiently convey and assure all the share or shares, right, interest, property, benefit, claim, and demand whatsoever of such deceased partner as aforesaid, of and in the estates, stock, property, and effects, and all matters and things relating thereto, unto the surviving partner, his heirs, executors, administrators, and assigns, or as he or they should direct or appoint; but in case such surviving partner as aforesaid should not, within twenty-eight days next after the expiration of the said copartnership term, declare in writing his option and intention to purchase and take the share of his deceased partner of the said premises, or, having declared such option as aforesaid, he should not pay to the executors or administrators of the deceased partner the full amount of the valuation aforesaid, within the time thereinbefore appointed, then the same or the like accounts should be made, stated, and settled by and between the surviving partner and the executors or administrators of the deceased partner, and the same or the like proceedings, acts, matters, and things, should take place and be made, done, and

executed by and between them, as thereinbefore directed to take place, and to be made, done, and executed by the said parties themselves on the expiration of the said partnership term of ten years.

1851.  
 In re  
 BURT, AND  
 TRUSTEE ACT,  
 1850.  
 Statement.

*William Burt* died in September, 1843, having by his will appointed *J. T. Burt* (who alone proved the will) and another, his executors, and leaving the infant *William Henry Burt* his heir at law and customary heir.

Certain freehold and copyhold property belonging to the partnership and vested in the two partners as tenants in common, descended, as to the share of *William Burt*, to the infant *William Henry Burt*; and the infant was admitted tenant of various copyhold tenements belonging to the partnership, and which became so vested in him. The fines, fees, and expenses incidental to such admissions were paid by *John Youngs*, the surviving partner, out of the funds of the partnership.

*John Youngs*, the surviving partner, being desirous of availing himself of the option to purchase the share of *William Burt* of the partnership estate and effects, given to him by the articles of partnership, gave notice in writing pursuant thereto to the executor of the said *William Burt* of his intention to purchase the same at a valuation, to be made in the manner provided by the said articles; and three valuers of the said share were accordingly appointed according to the terms of the articles. The valuers fixed the valuation of the estate, stock, and effects of the partnership at the termination thereof at the sum of 34,128*l.*, and the value of the two undivided third parts of *William Burt* at 22,752*l.* This valuation comprised all the hereditaments and premises which had descended upon the infant, and all the copyhold tenements to which he had been admitted.

1851.

*In re*  
BURT, AND  
TRUSTEE ACT,  
1850.

*Statement.*

*John Youngs* died on the 22nd of October, 1850, having by his will devised his part and share in the estates and effects of the partnership to his son *John Youngs*, his heirs, executors, administrators, and assigns; and having also by a codicil, after reciting that he had, in pursuance of the power contained in the partnership articles, given notice of his intention to become the purchaser of the share of his late partner *William Burt* at a valuation, and which valuation was then in progress, devised and bequeathed the said share of the partnership estate and effects so agreed to be purchased by him, and also his own share therein, to his said son *John Youngs*, his heirs, executors, administrators, and assigns, his said son paying the sum at which his late partner's share should be valued.

On the 26th of October, 1850, *John Youngs* the son paid to the bankers of the partnership to the account of the firm the sums of 22,752*l.* and 11,376*l.*, making together 34,128*l.*; and, after satisfying the liabilities of the firm and the prior charges on the same, two-thirds of the residue was paid over to the executor of *William Burt* in part satisfaction of the balance due to his estate on the settlement of the partnership accounts. An unascertained balance still remained due to the estate of *William Burt* from the partnership, and provision was made for the payment of such balance to the satisfaction of his executor; and he accordingly abandoned all claim in respect thereof upon the partnership property.

Upon the above state of facts, *John Youngs* the son charged before the Master under the Trustee Act, 1850, s. 38, that *William Henry Burt*, as such infant heir at law and customary heir of *William Burt*, was a trustee for him (*John Youngs* the son) of the legal estate of and in the several copyhold premises to which he (the infant) had been so admitted, and also of and in the undivided

third part of the freehold premises therein mentioned; and that an order ought to be made by the Court vesting the undivided third part of the freehold premises in *John Youngs* the son, his heirs and assigns; and that an order ought also to be made appointing a person therein named to convey the said copyhold premises unto *John Youngs* the younger, his heirs and assigns.

1851.  
 In re  
 BURT, AND  
 TRUSTEE ACT,  
 1850.  
 —  
*Statement.*

The Master certified the facts above stated, and that *John Youngs* the son was entitled to the order for vesting the estates in question in him. *John Youngs* the son thereupon moved for an order in conformity with the charge.

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Mr. *Rolt* and Mr. *Eddis* for the motion.—The Court has jurisdiction to make the order which is sought; and the only question is, whether the case is one in which the Court will exercise that jurisdiction. The infant is a trustee of the real and copyhold estates, which descended to him from *William Burt* his father, and which belonged to the partnership for the personal representative of the father, subject to the covenant entered into by the partners, that the representatives of the deceased partner should sell to the surviving partner his share of the partnership property. This covenant the executor of *William Burt* has agreed to perform. The executor of *William Burt* will sell to us the share of his testator in the partnership, and will (if the Court should deem it necessary, and if such appearance should be sufficient) appear by counsel, and consent to the order which is asked. The only question therefore can be, whether such a doubt exists, whether the freehold and copyhold property referred to is real or personal estate, that the Court will not in a summary form under the statute declare the infant heir a

*Argument.*

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1851.

*In re*  
BURT, AND  
TRUSTEE ACT,  
1850.

*Argument.*

trustee, and take the legal estate from him; or whether it is necessary to file a bill for that purpose. Counsel may be instructed to appear for the heir, and argue on his behalf the question whether the property of the partnership is real or personal estate.

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*Judgment.*

The VICE-CHANCELLOR said, that the question, as against the heir, must, to be determined, be brought before the Court by suit; and that he could not make the order upon petition or motion.

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June 16th.

BRUCE v. ELWIN.

In an interpleader suit, to determine the right of conflicting claimants to portions of an aggregate fund, the Court directed inquiries as to the claims of the several Defendants, and reserved further directions and costs. One Defendant obtained a separate report, finding his title to a portion of the fund; and, being unable to set down the cause on further directions, in consequence of the claimants of the other portions of the fund not having proceeded to establish their title, presented his petition for payment of the sum found due to him; but the Court refused to order such payment upon petition, or until the cause was heard on further directions, and the costs of the suit could be disposed of.

THE grantor of an annuity of 304*l.*, to the benefit of which conflicting claims were made, filed his bill of interpleader, and paid 2196*l.*, the repurchase-money, and 385*l.*, the arrears of the annuity, into Court, under an order of June, 1848. By the decree in March, 1849, the defendants were ordered to interplead, and inquiries as to their several claims were directed. The Plaintiff's costs were ordered to be taxed and paid, and further directions and the costs of the other parties were reserved.

*Lyne*, one of the Defendants, procured a separate report in March, 1851, finding that the annuity had been granted to the Defendant *Columbine*, a bankrupt, (whose practice the Master found had been from time to time to receive sums of money from various persons to invest in the purchase of annuities or proportionate parts of annuities, upon the account and for the benefit of such persons); that *Co-*

*lumbine* had declared himself a trustee for *Lyne* as to 100*l.*, part of the consideration money, and 14*l.* a proportion of the annuity in question; and that 100*l.*, such proportion of the consideration money, and 20*l.* 7*s.* 8*d.*, the proportion of the arrears, were due to *Lyne*. The report was confirmed, and *Lyne* then presented his petition, praying that he might be paid the 100*l.*, the 20*l.* 7*s.* 8*d.*, and his costs, out of the fund in Court.

1851.  
 {  
 BRUCE  
 v.  
 ELWIN.  
 —  
*Statement.*

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Mr. *James Parker* and Mr. *Dean* for the petition.—The petitioner in this case could not set down the cause on further directions, as the inquiries with regard to the title to the residue of the annuity and the consideration money had not been prosecuted. With these inquiries *Lyne* has nothing to do. They were probably mixed up with questions between the bankrupt and persons claiming as volunteers under the bankrupt, and his assignees, which might not be settled for years to come. In the meantime *Lyne's* title was clear. The report was confirmed. There was nothing in the reservation of further directions and costs until the Master should have made his report, to prevent the Court from acting upon the separate report. It was an interpleader suit, in which the claim of each Defendant was distinct; and there was the general liberty to apply. It had been suggested, that the fund might be primarily liable to the costs of other parties; but it was clear that *Lyne* had made no claim which he had not established. He therefore did not occasion the litigation, and his portion of the fund could not be liable to bear the costs of those who had occasioned it. A creditor or a legatee might, where the estate was cleared, apply by petition for payment of what was found due to him on a separate report, without waiting for the termination of disputes in which he was not interested.

*Argument.*  
 —

1851.

BRUCE  
v.  
ELWIN.*Judgment.*

Mr. *Stuart*, Mr. *Rolt*, and Mr. *Prior*, for the other Defendants, opposed the application.

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The VICE-CHANCELLOR said, that the case of the petitioner was one of evident hardship; and the Court would have desired to make the order, if it had been possible. There was a great distinction between the case of a party entitled to an aliquot part of a fund, the subject of a suit, the Court having reserved the consideration of further directions and the costs; and the case of a residuary legatee entitled to the whole fund subject to the costs. In the latter case, when it had been ascertained that the fund was more than sufficient to satisfy the costs, the Court might direct a portion of the fund to be paid to the legatee. In a case of this kind, if each claimant were permitted to apply upon petition, the number of applications might be indefinite. He could not order any payment to be made to the petitioner, unless it was clear that no part of what was so paid would be required for costs; and it was not at present shewn, by anything before the Court, how much of the costs of the suit might attach to the share of the petitioner, and how much to the shares of the other claimants of the fund.

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The petition was ordered to stand over, and to come on with the cause for further directions.



1851.

HILLS v. M'RAE.

July 22nd.

THE claim was filed by the creditor of a partnership against the estate of a deceased partner, the surviving partner not being made a Defendant.

In a creditors' suit for the recovery of a partnership debt against the assets of a deceased partner, the surviving partner is a necessary party; and the case is not within the 32nd Order of August, 1841, which enables a Plaintiff to proceed against one or more persons severally liable.

Mr. Woolley, for the Defendants, the executrix and devisees of the deceased partner, objected, that the surviving partner ought to be a party: *Wilkinson v. Henderson (a)*.

Mr. W. Morris for the Plaintiff.

The 32nd General Order of August, 1841, has obviated the necessity of making the co-debtor a party, where the parties are jointly and severally liable. If, however, the surviving partner be a necessary party, it will be sufficient to summon him in the Master's office, as he is not the party against whom the decree is to be made: General Order VIII. 22 April, 1850.

Upon a proceeding by claim in such a case, the surviving partner is not required to be before the Court at the hearing, but may be summoned before the Master.

The VICE-CHANCELLOR said, that the 32nd Order of August, 1841, did not apply to this case. In the case of a partnership debt, the surviving partner was the party legally liable to pay the debt, and might possibly have paid it. The surviving partner was a necessary party in a suit to recover a partnership debt against the estate of the deceased partner; but he might be summoned by the Master.

Judgment.

DECLARE that all persons who are creditors of *Donald M'Rae* the testator, are entitled to the benefit of this Order; and that the surplus of the estate, real and personal, of the said testator, after satis-

Minute.

(a) 1 My. & K. 582.

1851.

HILLS

v.

M'RAE.

Minute.

ying his funeral and testamentary expenses, and his separate debts, was liable in equity, at the time of his death, to the joint debts then due from the said testator and *George Potter* in respect of the partnership heretofore carried on by them, under the firm of *George Potter & Co.*, but without prejudice to the liability of the said *George Potter* thereto, as between himself and the said testator's estate. Refer it to the Master to take an account of what is due to the separate creditors of the said *Donald M' Rae*, and of his funeral expenses, and an account of what was due, at the death of the said testator, from the said partnership of *George Potter & Co.*, to the creditors of the said copartnership, and what is now due in respect of such debts; and let the said *George Potter*, the surviving partner, be summoned to attend before the Master in prosecuting the said last-mentioned inquiry. Inquire of the leasehold and personal estate of the testator, and take an account of the personal estate come to the hands of the Defendant *Mary Ann M' Rae*, his executrix. Just allowances. And let the testator's personal estate be applied, in the first instance, in payment of his separate debts and funeral expenses in a due course of administration; and then in payment of the joint debts of the said partnership. And if the Master shall find that the leasehold and personal estate of the testator is insufficient for the purposes of this suit, refer it to the Master to inquire what grandchildren of the testator were living at the time of his death, and have been since born, and whether any of them are since dead, and, if dead, who are their legal representatives. And let him also inquire who was the heir at law of the testator living at his death, and who is now such heir at law. And when all the said grandchildren now living, and the real representatives of such of them as may be dead, and the heir at law of the said testator, shall have been duly served with writs of summons to appear before him in proceeding under this decree, then let the Master inquire and state what real estates the testator died seised of, and whether there are any mortgages and incumbrances thereon. Reserve further directions and costs. Liberty to apply.—See Seton's Decrees, pp. 237, 239.

1851.

MOORE v. PRANCE.

July 12th &  
14th.

THE Plaintiff, a young man, twenty-four years of age, having an estate in *Devonshire*, became introduced to the Defendant, an attorney in a neighbouring county, and requested him to raise some money to pay debts which the Plaintiff had incurred, offering for such loan the security of his estate. The Defendant, in July 1846, soon after this introduction, advanced the Plaintiff 40*l*. Various communications afterwards took place between the Plaintiff and Defendant, and the Defendant procured for the Plaintiff a loan of 400*l*. from *Farthing*, a client of the Defendant. The Defendant thereupon prepared two deeds, which the Plaintiff executed; one of these deeds, dated the 3rd of August, 1847, and made between the Plaintiff and the Defendant *Prance*, after reciting the will of the Plaintiff's father, who devised his estates to his wife, for the educating and bringing up of his son and daughters until the Plaintiff attained twenty-three, when he devised the estates to the Plaintiff in fee, subject to an annuity of 150*l*. to the testator's wife; that the sum of 1500*l*. or thereabouts, part of the testator's estate, produced by the sale of an advowson, was invested in the names of trustees; that the Plaintiff being indebted to various persons in sums he was unable to discharge, and intending to proceed to reside on the continent for retrenchment and for other causes and reasons, had applied to the Defendant *Prance* to undertake the management of his affairs and become the trustee of all

A deed prepared by an attorney, and executed by his client, a young man who had applied to him to procure a loan of money, settling the property of the client so as to restrict his power of dealing with it, and appointing the attorney the trustee, recited that the trusts of the deed were created at the desire of the client, and for the purpose of placing the property under the management of the attorney. The client, by his bill to set aside the deed, denied the truth of the recitals, and insisted that the settlement was made without his knowledge or authority. The attorney, by his answer, alleged that the recitals were true, and that the deed was made and executed with the

knowledge and authority of the client, and in order to prevent him from dissipating his property, but gave no evidence of such knowledge or authority:—The Court *held* that the burden of proof was upon the attorney, and set aside the deed, with costs to be paid by him.

Matters of personal or private feeling cannot be considered in a question either of merits or of costs, as between trustee and cestui que trust; and therefore a trustee who deems himself to be or is assailed by imputations cast upon him by his cestui que trust, is not justified in refusing to do an act which his trust requires, until he receives an apology from the cestui que trust; and if he refuses, from want of such apology alone, to do an act which his duty as trustee requires, he will be liable to the costs of a suit brought to enforce the performance of such duty.

1861.

MOORE  
v.  
PRANCE.  
—  
*Statement.*

his property: the Plaintiff thereby, in consideration of the premises and to carry out the arrangement, conveyed the estates devised by the will of the father, or which the Plaintiff took as his heir at law, to the Defendant *Prance* in fee, upon the trusts after mentioned; and the Plaintiff thereby also, for like considerations, assigned the said 1500*l.*, or other purchase-money, to the Defendant *Prance*, upon the trusts after mentioned. The trusts were declared to be—to pay the Plaintiff's mother the 150*l.* a year out of the income, and 50*l.* a year further, so long as the Plaintiff should reside with her, for his maintenance, to discharge the interest of the money raised under the power therein contained, and the expenses of the trust thereby created, and to pay the balance to the Plaintiff during his life, or as he might direct or appoint by deed or will, and in default of appointment, and in case of his death intestate, unmarried, and without issue, to his sisters, as tenants in common. The Defendant *Prance*, or the trustee for the time being, was empowered to insure and grant leases; and, in order to arrange for the payment of the Plaintiff's debts and the supply of his occasions, and to pay the expenses of the trust, or for any other purposes, if it should appear expedient to the Defendant *Prance*, his heirs, &c., or other the trustee, to raise money by mortgage in fee, or by demise or assignment. The Defendant *Prance* and the trustee for the time being were also empowered at their discretion to sell or exchange the estates, and with the consent therein mentioned, or of their own authority, to revoke the said trusts, without prejudice to any lease or mortgage previously made, and to convey the same in pursuance of such sale or exchange. The trusts of the surplus arising from such sale or for equality of exchange, if made after the decease of the Plaintiff, were declared to be for his two sisters, as tenants in common, and, if made during his life, for investment upon like trusts. The deed also empowered any of the trustees, who were or might be solicitors, to make and receive professional charges

in respect of business done for the trust estate; and also gave to the Plaintiff, and after his decease to his two sisters, power to appoint new trustees, if the Defendant *Prance* or any other trustee or trustees should die, or refuse, &c., to act. The Plaintiff by the same deed covenanted to pay to the Defendant *Prance*, his executors, &c., all monies raised under the deed, one month after demand, with all costs, &c. By the other indenture, dated the 3rd of August, 1847, reciting the deed of the preceding day, the Defendant *Prance* (with the consent of the Plaintiff, party thereto of the second part) demised the estates comprised in the first deed to the Defendant *Farthing* for a term of 5000 years, to secure 400*l.* advanced by *Farthing* to *Prance* for the purposes expressed in the first deed, with interest; and the Plaintiff thereby covenanted to pay *Farthing* the said 400*l.* and interest.

1851.  
 MOORE  
 v.  
 PRANCE.  
 —  
*Statement.*

The parties appeared to have remained in the situation in which they were placed by these deeds, until March in the following year, when the Plaintiff applied for copies of the deeds; and a correspondence ensued, which ended in the bill being filed. The bill denied the truth of the recitals in the deed of the 3rd of August, 1847, as to the purposes of the trust, or the intention of the Plaintiff to create it; and prayed a cancellation of the deed, or a reconveyance of the estate and property; and also an assignment of the term created by the second deed, the mortgage to *Farthing* having been satisfied.

The Defendant *Prance*, by his answer, in justification of the trust deed, stated, that the Plaintiff was a young man of irregular and extravagant habits; and that he (the Defendant) had procured the loan for him, on condition that he would submit to tie up his property by way of guarantee against involving himself in further difficulties. The Defendant asserted, that the recitals were in conformity

1851.  
MOORE  
v.  
PRANCE.  
—  
*Statement.*

with the Plaintiff's representation to him, and that the disposition of the property by the deed was in pursuance of his expressed wish; that the Plaintiff, before he executed the deed, had heard it read, and understood and approved it. The Defendant stated, that his object in the transaction had been only that of saving the Plaintiff from ruin, and adopting a course which, while it avoided exposing him to his friends, which he dreaded, would yet meet with their approval. The Defendant offered to waive all claim for costs in the preparation of the deed, and to reconvey the property if the Plaintiff would make an apology for the imputation he had cast upon him, by charging him with imposition in the transaction, and with exorbitant charges.

No evidence was offered on behalf of the Defendant.

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*Argument.*  
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The *Solicitor-General* and Mr. *Headlam* for the Plaintiff.

Mr. *Follett*, for the mother and sisters of the Plaintiff, who were made Defendants as cestuis que trust under the deed, disclaimed all knowledge of the creation of the trust, and offered to release their interest in it, as the Court should direct.

Mr. *Bacon* and Mr. *Terrell* for the Defendant *Prance*, who was also the executor of *Farthing*, who had died after the institution of the suit.

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*Judgment.*  
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The VICE-CHANCELLOR said, it did not appear that, up to the time of the execution of the deed of the 3rd of August, 1847, anything had passed, beyond an application by the Plaintiff to the Defendant to assist him in procuring

a loan on the security of his property. The Defendant had prepared, not a security in the common form, but a deed, which delivered the Plaintiff over bound hand and foot into his power. He had no hesitation in saying, that a deed of such a description, if it could be maintained under any circumstances, could not be maintained without the clearest evidence of the instructions of the client, and his sanction and concurrence. It was the duty of the solicitor to dissuade his client from executing such a deed. A solicitor preparing such an instrument for execution by his client, without the clearest evidence to justify it, did so at his peril. The evidence of Mr. *Woodforde*, who had been examined on behalf of the Plaintiff, shewed that the Plaintiff had been improvident, and that his family had insisted upon the settlement of the proceeds of an advowson, which had been sold, and to which he was entitled; and the answer of the Defendant *Prance* stated, that he had thought it right to prepare the deed in question to protect the Plaintiff against his own improvidence. Upon this evidence, it was clearly impossible the deed could be maintained.

1851.  
 MOORE  
 v.  
 PRANCE.  
*Judgment.*

As to the costs.—In considering that question, he had to refer to the allegations in the bill, to the Defendant's answer, and to the circumstances which gave rise to the suit. The bill alleged, that the recitals in the deed were untrue,—that the Plaintiff had had no intention of going abroad, and had not requested the Defendant to undertake the management of his affairs;—that the Plaintiff had given the Defendant *Prance* no other authority than to prepare a common security for the 400*l.* and interest;—that the other parts of the deed, relating to the trusts, were inserted without the knowledge of the Plaintiff;—and that the deed was a fraud upon the Plaintiff. No evidence was offered by the Defendant *Prance*, to shew the truth of the recitals, which were thus denied; nor had the Defendant

1851.  
MOORE  
v.  
PRANCE.  
—  
*Judgment.*

even proved that the deed had ever been read over to the Plaintiff. On looking at the answer, the case made by the Defendant appeared to be, that he had prepared the deed from a good motive; that the Plaintiff had previously involved himself, and that his family had thought it necessary to tie up the proceeds of the advowson which belonged to the Plaintiff; and that the Defendant, therefore, had only resorted to the like means of protection. Admitting this answer to be true, it afforded no justification to the Defendant. It might be all very well for the friends of the young man, communicating with him, to advise, to desire, and even to press him to place his property in settlement; but it was a very different thing for an attorney to take upon himself to determine whether the estate should be settled or not. If it was expedient that the property should be tied up, why could it not have been tied up in other hands than those of the Defendant,—why not in the hands of some members of the Plaintiff's family? Looking at the nature of the deed, and at the duty imposed upon the Defendant, he was of opinion that the case was one in which he should not be carrying out the ordinary rule of the Court, if he were not to throw the costs of the suit upon the Defendant.

The result of the correspondence which had preceded the institution of the suit was this:—the Defendant had expressed himself willing to reconvey the premises to the Plaintiff, but required an apology from the Plaintiff as a condition for such reconveyance, on the ground, that the latter had said that the deed of settlement had been obtained from him improperly by the Defendant *Prance*. He could not give any countenance to the doctrine that a trustee could be permitted to refuse to reconvey trust property, because the cestui que trust declined to apologise for an alleged imputation on the trustee. If a trustee should think it right, on such a ground, to drive his cestui



que trust to a suit, he would do so at the peril of the costs, and liabilities arising out of the fact that he had refused to convey when applied to. If it were necessary to refer to the facts of the present case, the evidence did not appear to establish that any imputation had been cast upon the Defendant. But, however that might be, he thought a trustee was not justified in coming into Court on the ground merely that an apology had been refused. A trustee might well be justified in coming to the Court where an act was required from him which might prejudice his future position or accountability; but there could be no reason why a trustee should be allowed to mix up matters of personal or private feeling with the discharge of his trust. There could not be a doctrine more fatal to the interests of cestuis que trust than to hold that matters of personal or private feeling could be taken into consideration in determining questions, whether of merits or of costs, as between them and their trustees. In that view of the case, he was of opinion, that the allegations in the bill were necessary and were properly inserted. The Defendant might have acted under an innocent mistake, in supposing that he was justified in incumbering the Plaintiff with the trusts of the deed; but as he had failed to shew that this had been done at the desire of the cestui que trust, he must pay the costs of the suit.

1851.  
 MOORE  
 v.  
 FRANCE.  
*Judgment.*

1851.

*Trinity  
Vacation.*

THE GREAT NORTHERN RAILWAY COMPANY *v.*  
THE EASTERN COUNTIES RAILWAY COM-  
PANY.

An agreement between two Railway Companies, made without the authority of the legislature, whereby one Company delegates to another all the powers which have been conferred upon it by Parliament, is an unlawful attempt to effect that which Parliament alone can authorise, and is against public policy; and in such a case, the Court will not interfere to assist either of the parties in obtaining a collateral benefit, which the agreement would give, or aid them in any manner which would promote the object of the agreement.

Whether the 92nd section of the Railways Clauses Consolidation Act does or does not convert

Railways into public highways; and whether that section be or be not controlled by the 87th section of the same Act, giving powers to Companies to enter into agreements as to passing over or along each others' lines; yet, when an agreement as to the terms of passing over or along each others' lines has been entered into between Railway Companies, their rights in respect of such passing depend upon the terms of the agreement, and are no longer governed by the provisions of the Railways Clauses Consolidation Act.

THE bill was filed for an injunction to restrain the Eastern Counties Railway Company from obstructing the passage of the engines, carriages, and trucks of the Great Northern Railway Company, to and fro, over the junction of the East Anglian Railway with the Eastern Counties Railway, near *Wisbeach*, and from doing any act whereby the Great Northern Railway Company might be hindered or obstructed in passing freely, to and fro, between the Eastern Counties Railway, near *Wisbeach*, and the East Anglian Railways.

A motion for the injunction was made, and heard before the Vice-Chancellor in the long vacation. The reporter is informed that Mr. *Rolt* appeared for the Plaintiffs, and Mr. *Bethell* for the Defendants.

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The VICE-CHANCELLOR delivered the following judgment:—

This case was argued before me upon two grounds: First, that, under the provisions of the General Railway Acts, the Plaintiffs were entitled, independently of any agreement between them and the Defendants, to pass over the Eastern Counties Railway between *Peterborough* and *Wisbeach*, and thence on to and over the East Anglian

Railways; and secondly, that, whether they were so entitled or not, independently of their agreement with the Defendants, they were so entitled under that agreement.

The Plaintiffs did not attempt to derive, themselves, any rights under their agreement with the East Anglian Railways Company, or rely upon that agreement further than as evidencing the consent of that Company to the use of their lines by the Plaintiffs.

The argument on the part of the Plaintiffs upon the first point, was made to rest entirely upon the 92nd section of the Railways Clauses Consolidation Act (a), which it was said converted all Railways into public highways, and was not controlled by the 87th section of the same Act, giving powers to Companies to enter into agreements as to passing over each others' lines; but whatever may be the right construction of the Consolidation Act in those respects, agreements have in this case, in fact, been entered into with each of the Companies over whose lines the Plaintiffs claim the right to pass; and I think that where such agreements have been entered into, the rights of the parties can no longer be governed by the provisions of the Act; but must depend upon the terms of the agreements which have been made. I am of opinion, therefore, that the Plaintiffs cannot maintain their case independently of their agreements with the Defendants.

With respect to the second point, which, indeed, was mainly relied on by the Plaintiffs, I think that upon the true construction of the agreement between the Plaintiffs and Defendants, the Plaintiffs are entitled to pass over the Eastern Counties Railway on to the East Anglian Railway, and to use the Eastern Counties Railway for

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(a) 8 & 9 Vict. c. 20.

1861.

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that purpose (a). The recitals of this instrument shew, that it was intended to grant some powers and rights be-

(a) The bill, and the affidavit in support of it, thus described the agreement:—

“That the Plaintiffs, on the 29th of May, 1849, made an agreement with the said Eastern Counties Railway Company, by which, after reciting the *Boston, Stamford, and Birmingham Railway Act, 1846, Stamford and Wisbeach Line*; and an agreement entered into between the Great Northern Railway Company and the *Boston, Stamford, and Birmingham Company*, in February, 1847, under the authority of the Great Northern Railway Company Purchase Act, 1847; and that it had been agreed between the Eastern Counties Railway Company, and the *Boston, Stamford and Birmingham Railway Company*, and the Great Northern Railway Company, that, in order to obviate the necessity of constructing the line from *Peterborough to Wisbeach*, and in consideration of the abandonment of the same, the Defendants granted unto the Plaintiffs, their successors and assigns, that thenceforth, and so long as certain lines therein mentioned should not be constructed (which never had been constructed, and the powers for constructing which had expired), and for ever, in case the same should never be constructed, it should be lawful for the Plaintiffs, their successors and assigns, to have and exercise full and free right to run their trains, with their own engines,

to and fro over those parts of the lines of Railway belonging to the Defendants which lie between the Great Northern Railway, at or near *Peterborough*, and the Eastern Counties Railway station at *Wisbeach*, proceeding through *March*, and also to use all the stations, watering places, sidings, and other conveniences upon or appertaining to the same lines, and free ingress, egress, and regress for all agents, servants, and workmen, and other authorised officers of the Great Northern Railway Company, in, to, and from such parts of the said Railway stations and appurtenances of the Eastern Counties Railway Company, as might be necessary and convenient for the conduct and management of the trains and traffic of the Great Northern Railway Company, working on and over the same; and that the times and manner in which the engines and trains of the respective Companies shall run over the portions of the line therein-before authorised to be used by the engines and trains of the Great Northern Railway Company, and the rules and regulations to which the same respectively shall be subject, shall be settled, in case of difference between them, in the manner thereafter provided. That the Great Northern Railway Company shall pay to the Eastern Counties Railway Company for the use of the before-mentioned portions of their said Railway, and in lieu of all

yond the power of using the Eastern Counties Railway from *Peterborough* to *March* and *Wisbeach*; and the grant itself is not merely of the right to pass, to and fro, over those parts of the lines of railway belonging to the Eastern Counties Railway Company, between the Great Northern Railway at *Peterborough*, and the Eastern Counties Railway station at *Wisbeach* (terms which may of themselves well be construed to give the right to pass over any part of the lines); but also of the right to use all stations, watering places, sidings, and other conveniences, (not merely appertaining to but) upon and appertaining to the same lines, and of the right of access to such parts of the railway stations and appurtenances of the Eastern Counties Railway Company, as may be necessary and convenient for the conduct and management of the trains and traffic of the Great Northern Railway Company, working (not merely on but) on and over the same; and this is followed by a covenant on the part of the Eastern Counties Railway Company, to give to the traffic of the Great Northern Railway Company the same facilities and assistance at their several stations, and off the same, along

other tolls and charges or sums of money, after the rate of 60% for every 100%, which they the Great Northern Railway Company shall actually receive in respect of the traffic passing over such parts of the Eastern Counties Railway Company's railway as may be traversed by the engines and carriages of the Great Northern Railway Company; and that the charges for such passage to be made by the Great Northern Railway Company shall in no case be less than the charges actually, for the time being, made by the Eastern Counties Railway Company in

respect of the traffic upon the same railway for equal distances. That the Eastern Counties Railway Company shall, by their servants and officers, give to the Great Northern Railway Company all such and the same facilities and assistance at their several stations and off the same, along the parts of their line which may be traversed by the trains of the Great Northern Railway Company, as is usually given, and as shall, for the time being, be actually given to their own traffic of the same class or character."

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Construction of an agreement between two Railway Companies enabling one to pass over and use the Railway stations, watering places, and sidings, upon and appertaining to the other, and giving the right of access to such parts of the stations and appurtenances as were necessary to the traffic on and over the other, with a covenant to give the same facilities and assistance as their own traffic of the like character should receive.

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parts of their line which may be traversed by the trains of the Great Northern Railway Company, as is usually given, and as shall for the time being be actually given to their own traffic of the same class or character. The construction contended for by the Plaintiffs seems to me, therefore, to be supported both by the recital of the instrument and the terms of the covenant, which, I apprehend, must be construed most strongly against the Defendants; and I see nothing in the context to alter that construction.

It was said, indeed, that the Eastern Counties Railway Company had not the right at the time to use the junction, and could not therefore intend to grant any such right. But, independently of the evidence in the case, which I think proves that the junction was in use, I think that the Eastern Counties Railway Company, having granted the use of those lines, and of all conveniences upon the lines, cannot object to their grantees using the conveniences granted for any purposes for which they may be able to apply them, although they may not themselves be entitled to use them for such purposes.

It was also said, that this junction was beyond the limits of deviation of the East Anglian Railway; but I do not think it is competent to the Defendants to raise that objection against their own grant.

If, therefore, this case had rested wholly upon the construction of the agreement between the Plaintiffs and the Defendants, I should have thought it the duty of the Court to interfere to some extent by injunction; but I think there lies at the root of this case a question of public policy, which precludes the interference of the Court. It is impossible to read the agreement between the Plaintiffs and the East Anglian Railways Company (a) without being

One Railway Company having granted to another the use of their lines, and of all conveniences upon the lines, cannot object to their grantees using the conveniences so granted for any purposes to which they may be able to apply them, even if the grantors themselves were not entitled to use them for such purposes, —semble.

(a) The reporter has no copy of this agreement. The bill and the affidavits for the Plaintiffs thus described it:—

satisfied that it amounts to an entire delegation to the Plaintiffs of all the powers conferred by Parliament upon

"By an agreement, made the 16th of May, 1851, between the Plaintiffs and the East Anglian Railways Company, it was, amongst other things, agreed, that the Plaintiffs might and should, during the term of twenty-one years from the 2nd day of June, 1851, work over the said East Anglian Railway, and receive the tolls and charges, and all the income due in respect of the traffic which should be carried by them, on the terms therein mentioned. And under the said agreement, the Plaintiffs are entitled to the use of all the railways, works, and conveniences of the East Anglian Railways Company."

The same deponent also added, in reply to the affidavits filed for the Defendants:—"That there is no arrangement between the East Anglian Railways Company and the Plaintiffs, other than that contained in the last-mentioned agreement; and that the East Anglian Railways Company do not, by the said last-mentioned agreement, abandon the working of their lines; and that there is no provision in the said agreement purporting to require them so to do, nor any provision therein to prevent their working the same; and that the Plaintiffs, though they have undertaken to work on and over the same, have not, under the said agreement, acquired or purported to acquire any exclusive right to work over the same."

On the other hand, the secre-

tary of the Defendants, by his affidavit made on their behalf, said, "That, by some arrangement between the East Anglian Railways Company (into which the *Lynn* and *Ely* Railway Company and certain other Companies have been consolidated) and the Plaintiffs, being, as I believe, the agreement of the 16th of May, 1851, referred to in the bill, the East Anglian Railways Company have (but without any Parliamentary authority for that purpose) altogether abandoned the working of their lines, and the Plaintiffs, without any Parliamentary authority for that purpose, have undertaken to work the same." The deponent also added:—"I say, that, in the year 1847, an agreement was entered into between the *Lynn* and *Ely*, *Ely* and *Huntingdon*, and *Lynn* and *Dereham* Railway Companies, now constituted the East Anglian Railways Company, and the Defendants, whereby the Defendants agreed to take a lease of all the lines of Railway belonging to the said *Lynn* and *Ely*, *Ely* and *Huntingdon*, and *Lynn* and *Dereham* Companies, but that Parliament refused to sanction an Act for carrying such agreement into effect; and, I believe, the said agreement of the 16th of May, 1851, is very imperfectly set forth in the bill; and that, if the same were produced, it would appear, and that the fact is, that the same is an unauthorised and illegal attempt

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the East Anglian Company. All the stock of that Company is to be taken by the Plaintiffs without any obligation to restore it. The Plaintiffs are to manage and regulate the railways of the East Anglian Company for the purposes of the agreement; and although in form it is declared that the instrument shall not operate as a lease or agreement for a lease, it amounts in substance either to one or the other. It is framed in total disregard of the obligations and duties which attach upon these Companies; and is an attempt to carry into effect, without the intervention of Parliament, what cannot lawfully be done except by Parliament in the exercise of its discretion with reference to the interests of the public.

It is true that the Plaintiffs do not found their case upon this agreement; and that, whether the injunction be granted or not, the agreement remains in force: but it is not less true that the interference of the Court will promote the object of the agreement, and extend and facilitate its operation; and I think it is the duty of this Court to withhold its interference when called upon to act in aid of agreements of such a nature. My opinion, which I have framed upon the case, being thus dependent upon the legality of the agreement between the Plaintiffs and the East Anglian Company, I will, if the Plaintiffs desire it, send a case for the opinion of a Court of law upon that question; but if the Plaintiffs do not desire to take the case, my order will be to refuse the motion, and direct the costs of it to be costs in the cause.

to obtain for the Plaintiffs, without the sanction of Parliament, the like benefit as would have been obtained by the Defendants

by means of the said agreement of 1847, if the same had been sanctioned by Parliament."



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COMPANY.

*Trinity  
Vacation.*

**T**HIS was an application by a proprietor of original shares in the Company, to restrain the Company and the directors from carrying into effect a proposed scheme for the commutation of a certain privilege or guarantee, upon which a subsequently created class of shares, called half shares, had been subscribed; and from declaring or paying any dividends, except out of the clear profits of the current half year, or whilst any unsecured or floating debt of the Company should remain due.

After the creation of the original shares in a Railway Company, a further capital was raised in half shares, upon which a resolution of the directors guaranteed interest at 6l. per cent. for ten years.

On a motion

by a holder of original shares, to restrain the Company from paying any interest or dividends on the half shares out of the profits of capital subsequently created, in preference to the interest or dividends on the original shares, and from paying any preferential interest or dividends on the half shares, while any of the floating or unsecured debt of the Company was unpaid, except out of the clear profits of the current half-year—the Company entered into an undertaking not to make such payments, unless under the authority of Parliament, until the hearing or further order. By a subsequent Act of Parliament it was enacted, that it should be lawful for the Company to commute the guarantee attached to the half shares into any other guarantee or privilege, perpetual or terminable, which should be agreed upon by four-fifths of the shareholders of the Company at meetings, after notice, as therein mentioned. The directors thereupon proposed to commute the guarantee into an annual payment for each half share in perpetuity. Upon a motion to restrain the Company from in any manner acting on or giving effect to the proposed scheme for the commutation of the guarantee, or from declaring or paying any commuted or other dividend on the original or half shares, while any of the unsecured debt remained due, and except out of the clear profits of the current half-year, and so far as such profits should be sufficient after payment of such debt, and, upon a cross-motion, to discharge the undertaking:—*Held*, that the Act of Parliament authorising the commutation did not take the case out of the undertaking; and that, therefore, the undertaking was binding until the hearing of the cause, or the further order of the Court.

That the undertaking was not an agreement which bound the Defendants to do nothing in the matter, the subject of the injunction, except under the order of the Court, or unless the Court should be of opinion that what they proposed to do was proper to be done; but was in the nature of an injunction obtained without argument, and which the Defendants might apply to discharge.

That, upon the construction of the resolution, the holders of half shares were entitled to the guaranteed 6l. per cent. out of any funds of the Company which could be lawfully so applied, and therefore out of future profits, before any dividend could be payable upon the whole shares.

That, independently of the construction of the resolution, the Act of Parliament having authorised a commutation of the guarantee, and the commutation having received the consent required by the Act, the Company might lawfully carry it into effect.

That the principles which apply to partnerships composed of a limited number of persons, apply to such Companies; and that the majority of the partners in a partnership of a limited number, constituted with similar provisions as to profits, could overrule the minority, upon the question, whether profits should be divided while debts of the partnership were unprovided for.

That the manner in which profits were to be ascertained and divided was a question of internal management, and within the power of the Company to direct.

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The motion was heard before the Vice-Chancellor in the long vacation.

Mr. *Stevens* was of counsel for the Plaintiff, and Mr. *C. Hall* for the Defendants.

VICE-CHANCELLOR:—

There are two classes of shares in this Company: the original shares and the half shares. The original shares are 50*l.* shares, and represent the original capital of the Company, which, for the purposes of the present motion, may be taken to have been the sum of 1,000,000*l.* It was in fact 1,100,000*l.*; but in consequence of a resolution passed immediately after the constitution of the Company, 2000 of the shares were never issued. The half shares of 25*l.* represent the sum of 500,000*l.* increased capital of the Company, authorised to be raised under one of their Acts. The half shares were created on the 15th of March, 1847, and have a guarantee or privilege attached to them,—the resolution of the directors by which they were created being in the following terms:—“That 6*l.* per cent. per annum be guaranteed until the 15th of March, 1857, upon all calls duly paid, and upon all sums received in contemplation of calls by authority of the Board of Directors, in respect of such half shares; and that the said guarantee shall not exclude the shareholders from participation in any higher rate of dividend for the time being payable on the whole shares.” It appears that no dividend or interest has been paid, either on the half shares or on the original shares, since the year 1848; and in the year 1850 the Company, in addition to a mortgage and bond debt, to the amount of 478,166*l.*, created under the powers of its Acts, had incurred a floating and unsecured debt to the amount of 97,000*l.*, or thereabouts. In this state of circumstances, a bill was introduced into Parliament in the session of

1850 for enabling the Company to raise, by the creation of new shares, a further capital to be applied in liquidation of the mortgage and bond debt, and of the floating and unsecured debt, and, as to 50,000*l.*, for general purposes; and by this bill it was proposed, that the future income of the Company should be applied, first, in payment of the interest of the debts, and of the shares to be created for the liquidation of them; and then in payment not only of the preferential dividend guaranteed upon the half shares, but of the arrears, and any future deficiency of such preferential dividend, without reference to the period or half year when such deficiency occurred.

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*Judgment.*

The Plaintiff is a very large holder of original shares in the Company; and upon the above application to Parliament being made, he filed his bill in this Court, by which, as first amended, after alleging, amongst other things, that the effect of the resolutions by which the half shares were created was, that the clear and divisible profits of each current half year were to be the only fund for the payment of the preferential dividend; and that the profits of one half year were not to be liable or applicable to make good the deficiency of such preferential dividend in any previous half year; that the holders of the half shares were not entitled to the preferential dividend out of any profits derived from increased capital; and that the directors had in hand profits of the past year which ought to be applied, first, in payment of the floating and unsecured debt, and then in payment of a dividend upon the shares in the Company, during the period in which such profits were earned; but that the directors intended to apply the same in payment of the arrears of the preferential dividend; and that such payment would be illegal: he prayed an injunction to restrain the Company and its directors from paying any interest or dividends on the half shares, in preference to dividends or interest on the

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original shares, out of any profits derived from any other capital than that which, at the date of the resolutions creating the half shares, had been or could be raised under the provisions of the Company's Acts; and from paying any preferential interest or dividends on the half shares while any of the floating or unsecured debt was unpaid, except out of the clear and divisible profits of the current half year properly applicable to the payment of a dividend, and so far as such profits might be sufficient for the purpose.

The Defendants having put in their answer to the original bill, and thereby stated their intention to apply the clear profits in hand in paying to the holders of the half shares the preferential dividend upon such shares for the half years which had elapsed since the shares were created, the Plaintiff, on filing the amended bill, gave notice of a motion for the injunction prayed by it. The motion came on upon the 31st of July, 1850, and was ordered to stand over till Michaelmas Term,—the Defendants undertaking not to declare or pay any dividend in the meantime,—and the motion, having again come on in Michaelmas Term, was again ordered to stand over till Hilary Term, upon an undertaking by the Defendants in the terms of the notice of motion.

The Defendants then put in answers to the amended bill; by which they stated, that until the arrangement after mentioned was taken into consideration, they had considered that the profits which they had in hand were applicable to the preferential dividend, including the arrears; and that the capital debt ought to be provided for by the creation of new shares, or otherwise, as Parliament might sanction; but they never intended to apply them in payment of interest or dividends, until such time as the capital debt was so provided for; and that, in fact,

nearly all the profits which they had in hand had been applied towards payment of capital debt; such application having been considered as a temporary loan, to be repaid as soon as, under the authority of Parliament, monies for that purpose should have been provided.—They then referred to a report of the directors recommending the arrangement with the holders of half shares, which has since been adopted under the provisions of the Act of Parliament obtained in the last session; and to a resolution of the shareholders approving the report, and authorising the directors to apply to Parliament for powers to give effect to the recommendation; and they stated, that it was not intended to apply any profits to the payment of interest or dividends, so long as any capital debt remained unpaid, unless Parliament should have given the Company such powers as would justify such application; and in one of the answers there was a passage, to the effect, that it was not intended to apply any profits to the payment of the preferential dividend, till the capital debt had been fully paid off.

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The motion again came on, after the filing of these answers; and on the 24th of February, 1851, an order was made upon it, by which, the defendants undertaking that the order should be without prejudice to any question between the parties, and also undertaking to do nothing, unless under the authority of Parliament, contrary to the notice of motion, until the hearing of the cause or until further order, it was ordered, that the Plaintiff should be at liberty to amend his bill.

In pursuance of the liberty given by this order, the Plaintiff re-amended the bill, and thereby prayed the injunction against the payment of the preferential dividend, only whilst the floating or unsecured debt should remain due and unpaid or unprovided for.

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The Defendants by their answer to the re-amended bill stated, that the unsecured debt amounted to upwards of 100,000*l.*, and that the assets available for payment of it were under 20,000*l.*; that it could only be paid off by the creation of new capital by the authority of Parliament, or by applying the profits, after keeping down the interest on the mortgage and bond debt, to that purpose; and that they intended to apply such profits accordingly, unless and until some other provision should be made by Parliament for such purpose; and they also stated, that the balance of profit remaining in hand, after payment of the interest of the mortgage and bond debt, was 789*l.* 19*s.* 7*d.*; which was meant to be applied in payment of the unsecured debt, subject to any provision Parliament might make for the payment; and further, that the balance of profit on the next account would be applied as Parliament might sanction, and, in default of such parliamentary sanction, in liquidation of the unsecured debt of the Company.

At this point, the proceedings in the original suit terminated; but the Bill, which was introduced into Parliament in the session of 1850, having been rejected, the Defendants, in the last session of Parliament, applied for and obtained an Act (*a*), by which, after providing for the creation of shares or stock in place of a like amount of the mortgage or bond debt, it was enacted (sect. 7), that, subject to the rights of the holders of the shares or stock created in place of the mortgage and bond debt, it should be lawful for the Company to commute the guarantee and privilege attached to the half shares into any other guarantee or privilege, whether perpetual or terminable, which might be agreed upon in manner after mentioned, as an equivalent for the existing guarantee and privilege; and to attach such new or altered guarantee and privilege to the half shares or to any stock into which the same might be con-

(*a*) Stat. 14 & 15 Vict. c. liii. (Local and Personal). (3rd July, 1851).

verted; but it was (by section 8) enacted, that no commutation of half shares should be made under the powers of the Act, until a scheme, setting forth the particulars thereof, and especially the fixed or rateable dividends proposed to be attached to the half shares or to the stock into which they might be converted, in substitution for the 6l. per cent. guaranteed, and the privileges, if any, to be secured to the holders thereof, should have been sent to each shareholder; nor without the concurring votes of the holders of at least four-fifths of the whole shares, and of the holders of at least four-fifths of the half shares, represented at a meeting to be convened by the directors, for the purpose of taking the scheme into consideration; with a proviso that such consent, if given, should be binding and conclusive on all the shareholders in the Company; and, after providing for the cancellation of the 2000 unissued shares in the original capital, and of certain other shares which had been surrendered and forfeited, it was (by sect. 12) enacted, that, subject to the provisions of the Act, the Company might create and issue shares in the stead and to the nominal amount of the cancelled shares; and that the monies raised thereby should be applicable to the general purposes of the undertaking authorised by the Company's Acts; with a proviso that the existing debts of the Company, other than the mortgage and bond debt, should be paid thereout. The Act contained further provisions as to the shares to be thus created,—that the Company should not, by the creation of them, increase the capital of 1,600,000l., which they were authorised to raise—that 20l. per cent. should be the greatest amount of any one call—and two months at least the interval between successive calls—and that the aggregate amount of calls on any share in any year should not exceed four-fifths of the nominal amount of the share; that the shares should not be created without the consent of at least four-fifths of the votes of the shareholders present at a meeting of the Company to be

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*Judgment.*

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*Judgment.*

specially convened for the purposes of determining as to such creation; with a proviso, that the consent, if given, should be binding on all the shareholders; that the holders of the shares should be entitled in respect thereof to a certain number of votes, but should not in respect thereof have any vote as to the commutation or conversion of the half shares; and that, subject to the provisions of the Act, the Company might issue the shares at such times and of such amounts, and in such classes, and bearing such interest or dividend, preferential or otherwise, and with such privileges, and on such terms and conditions, and generally in such manner, as the Company, with the consent of four-fifths of the votes of the shareholders present at a general meeting, to be specially convened for the purpose, should determine.

In pursuance of the provisions of this Act, the directors of the Company prepared and issued a scheme for the commutation of the half shares, by which scheme it was proposed that the existing guarantee or privilege attached to those shares should be commuted as follows:—that each half share should bear a fixed dividend in perpetuity, at the rate of 10s. 9d. per annum, payable half-yearly, in priority to all other dividends, except on shares or stock created in substitution for the mortgage or bond debt. That the substituted guarantee and privilege should take effect from the 15th of September, 1850. That the first payment in respect thereof should be a dividend at the rate aforesaid, for the half year ending the 15th of March, 1851; and thereafter that the fixed dividend should be paid half-yearly. That the substituted guarantee and privilege should be received as a full satisfaction for all arrears and future payments of interest originally guaranteed on the half shares, and in satisfaction of all further claims thereon to the 15th of March, 1857; but that, in case the surplus net revenue should permit a dividend to be made



in respect of the 50*l.* shares, exceeding 6*l.* per cent. per annum, the commutation should not exclude the holders of the half shares from participating in the surplus, rateably with the holders of the 50*l.* shares; and that, after the 15th of March, 1857, the holders of the half shares should, in addition to the fixed dividend of 10*s.* 9*d.* per half share, be entitled to the same rate of dividend per cent. as that which might from time to time be declared in respect of the whole shares. This scheme appears to have been founded on the report of an actuary, that the 10*s.* 9*d.* per half share in perpetuity was equal in value to the 6*l.* per cent. originally guaranteed for the period of ten years during the part of that period for which it had not been paid.

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Notice having been given of an extraordinary meeting, for the purpose of taking this scheme into consideration, the Plaintiff filed a supplemental bill, by which, after alleging that the Act of the last session does not contain any provision authorising the profits of the undertaking to be divided among the shareholders by way of dividend, so long as any of the capital or unsecured debt remains unpaid or unprovided for; and that the payment of any dividend out of profits whilst the debt is unpaid, will be a breach of duty on the part of the directors, and a violation of the undertaking; and further alleging, that it is uncertain whether the new shares will be issued, and if issued, whether they will be taken, and whether the calls upon them will be paid, and that the profits ought not to be divided until a fund shall have been actually obtained for payment of the unsecured debt; and also alleging, that the proposed scheme is not authorised by the provisions of the Act; and that it is beyond the authority of the directors to propose, and of the meeting to confirm:—he has prayed an injunction to restrain the Company and the Directors from in any manner acting on, or giving

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effect to, the proposed scheme for the commutation of the privilege or guarantee attached to the half shares, and from paying or declaring any commuted or other dividend on any of the original or half shares in the Company, while any of the unsecured or floating debt remains due and unpaid, and except out of the clear and divisible profits of the current half-year for the time being, properly applicable to the payment of a dividend; and so far as such profits, after payment of such debts, shall be sufficient for that purpose.

The Plaintiff has now moved upon the supplemental bill for the injunction prayed by it. The motion was, in the first instance, made before the scheme for commutation had been submitted to the shareholders according to the provisions of the Act; and it then stood over, in order that the scheme might be laid before the shareholders, and to afford the Plaintiff the opportunity of considering its effect, it having been suggested, that the adoption of the scheme would enable an immediate dividend to be made on the original as well as on the half shares. The scheme having been submitted to the shareholders and approved by them, but being still objected to by the Plaintiff, the motion was again brought on and argued.

Upon the argument of the motion, it was agreed, that the case should be considered as if a counter-motion on the part of the Defendants, to discharge the undertaking of the 24th of February, 1851, had come on with the motion for the injunction.

The case, therefore, falls to be considered in three points of view:—First, whether the Act of last session contains any such authority of Parliament as will take the case out of the undertaking. Secondly, whether, if the case be within the undertaking, the Defendants are entitled to be

relieved from it. And, thirdly, whether, if the undertaking be put out of the case, the Plaintiff is, upon the merits, entitled to the injunction.

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As to the first point, I am of opinion, that the Act of last session does not contain any such authority as will take the case out of the undertaking. The undertaking must be construed most strongly against the parties by whom it was given; and I think that authority, by positive enactment or by necessary conclusion from the other provisions of the Act, was required to take the case out of its reach; and that it is not sufficient for that purpose that Parliament has not prohibited the payment of the dividend, or may have contemplated that it might be paid consistently with the provisions of the Act. It was argued, that Parliament must have intended the dividend to be paid, because it has appropriated the capital to be raised by the new shares, which is payable only by instalments, to the payment of the floating or unsecured debt, and has made no provision for recouping the profits, if applied in the payment of it; and, again, because the new shares are postponed to the half shares; and if the dividends are not paid upon the half shares, no dividends can be paid upon the new shares. But these arguments lead to no certain conclusions. There may be difficulties in carrying out the Act which may not have been foreseen; but I cannot impute to Parliament the intention to authorise by the Act the payment of the dividend out of the profits: as the effect of such a construction would be, either to compel the creditors to wait for payment until funds sufficient for the purpose were raised by means of the new shares; or, if they desired more immediate payment, to drive them upon the stock and assets of the Company, which it was the manifest object of the Act to preserve.

It is necessary, therefore, to consider the case upon the

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second point, whether the Defendants are entitled to be relieved from the undertaking. It was argued on the part of the Plaintiff, that the Defendants could not be so entitled, unless the Court was of opinion, that what they proposed to do was proper to be done; but I do not think this argument can be maintained. It is true, that the undertaking having been entered into upon the motion being finally disposed of, and being contained in an order which could only be made by arrangement between the parties, may well be considered as an agreement on the part of the Defendants; but it is an agreement only to do nothing contrary to the then pending notice of motion, unless under the authority of Parliament, until the hearing of the cause or until the further order of the Court, terms which do not appear to me to import, that nothing contrary to the notice of motion was to be done, except under the order of the Court. Had this been the intention of the parties, the order would, I think, have been differently expressed; the more so, as express reference is made to the authority of Parliament. I see nothing, therefore, which could have precluded the Defendants from asking the opinion of the Court upon the question, whether they ought any longer to be bound by the undertaking, even if the circumstances of the case had remained wholly unaltered; but I think that, at all events, there is enough of alteration in the circumstances of the case, to warrant the defendants in calling for the judgment of the Court upon that question, for the profits in hand are now of much greater amount than they were at the period when the undertaking was given; and the power which has been given by Parliament to commute the preferential dividend, has afforded the Company better prospects than they then had of raising money for the payment of the unsecured or floating debt. In my opinion, therefore, the Defendants have the right to move to discharge the undertaking, and the case must be considered exactly as it would have stood if an injunction in

the terms of the undertaking had been granted as of course, and without the matter having been mentioned to the Court, and the Defendants had moved to dissolve, and the Plaintiff to extend the injunction.

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I proceed, therefore, to consider the question upon the third point—whether, upon the merits of the case, the Plaintiff is entitled to the injunction.

The case on his part appears to rest on three grounds: first, that the holders of half shares are not entitled to profits derived from increased capital; secondly, that the holders of half shares are only entitled to dividends out of current profits, and are not entitled to arrears of dividends out of the profits of subsequent years; and thirdly, that the earnings of the line cannot lawfully be applied to the payment of dividend, while the floating or unsecured debt remains unpaid and unprovided for.

As to the first point, it is unnecessary to say more than that the profits now in question are not derived from any increased capital; and as to the second point, I think, that as between the holders of half shares and of the whole shares, the holders of the half shares were upon the construction of the resolution, by which those shares were created, well entitled to the 6½ per cent. guaranteed out of any funds of the Company, which could be lawfully applied to the payment of it, and, therefore, out of future profits, before any dividend could be payable upon the whole shares. This appears to me to be the plain import of the resolution; and the Court would not, I think, be justified in putting a strained construction upon it, on behalf of the holders of the whole shares, at whose instance and for whose benefit the half shares were created. If this part of the case had depended upon the construction of the resolution, there would not, in my opinion, have been sufficient doubt upon it to have justified the Court in

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interfering by injunction; but, I think that, independently of the question of construction, the Act of last session having authorised the commutation of the guarantee, and the commutation having been made with the consent required by the Act, the point must be considered to be at rest.

The remaining point to be considered is the payment of the dividend whilst the floating or unsecured debt is unpaid, and, except by the power to create new shares, is unprovided for; and I am of opinion, that the Court ought not, upon this ground, to interfere by injunction. I think that the clause relating to dividends, which is contained in the Company's first Act (a), and which was referred to in this branch of the argument, is to be considered as directory. It does not point out the manner in which the profits are to be ascertained, or in what manner the scheme by which they are to be shewn is to be prepared. If such a clause was inserted in a deed of partnership, between a limited number of individuals, who had agreed to bring in capital by instalments, I think the majority of the partners could overrule the minority upon the question, whether profits should be divided while the debts of the partnership were unprovided for; and the principles which apply to partnerships limited in number, apply also to these great Companies. I think also, that the question upon this third

(a) Stat. 7 & 8 Vict. c. lxxviii. (Loc. & Pers.) s. 128: "That previously to every ordinary meeting the directors shall cause a scheme to be prepared, shewing the profits, if any, of the Company for the period current since the immediately preceding ordinary meeting, and apportioning the same, or so much thereof as they may consider applicable to the

purposes of dividend, among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting; and at such meeting a dividend may be declared according to such scheme."

point is one of internal management, with which the Court cannot interfere; and that the case of *Browne v. The Monmouthshire Railway and Canal Company* (a) goes far to govern the present.

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It was attempted in the first instance to support the Plaintiff's case upon the ground that the proposed scheme for commutation was *ultra vires*; but on my intimating an opinion unfavourable to that view, the point was not further pressed, and I think no weight is due to it.

The Plaintiff also, in the argument, relied much upon the statements of the answers as to the intention of the Defendants, and upon the state of the Company's affairs, and the alleged invalidity of a resolution which appears to have been passed for the creation of the new shares; but, I think that the Defendants have not, by the answers, precluded themselves from disputing the right to the injunction; and for the reasons above given, I do not think it necessary to enter upon the other points.

Upon the whole, therefore, I am of opinion, that the undertaking ought to be discharged, and the injunction refused. It must not, however, be understood, that I give any authority for the payment of the dividend. I discharge the undertaking, upon the ground that the Defendants are entitled to the opinion of the Court, whether the injunction should be granted; and I refuse the injunction, upon the ground that the Plaintiff has not made out a sufficient case for the interference of the Court. The costs of the motion must be costs in the cause.

(a) 13 Beav. 32.

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29th, & 30th.  
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## ATTORNEY-GENERAL v. THE BISHOP OF WORCESTER.

Nov. 8th.  
If a scheme for the regulation of a charity, settled by a decree, does not operate beneficially for the charity, and the Attorney-General considers that the interests of the charity would, consistently with the foundation, usage, and law, be

promoted by an alteration of the scheme, it is competent to him to apply to the Court for such alteration; but schemes which have been settled under the directions of the Court ought not to be disturbed upon merely speculative views, or in matters of discretion or regulation, upon which Judges or Attorneys-General may differ in opinion, or except upon substantial grounds and clear evidence, not only that the scheme does not operate beneficially, but that it can, by the alteration, be made to do so consistently with the object of the foundation.

A scheme, settled by decree, which might be altered upon information, may be altered upon petition under Sir *S. Romilly's* Act, (52 Geo. 3, c. 101), if otherwise a proper subject for such a petition.

Although it has been held that a decree of the Court of Chancery confirming the decree of the Commissioners of Charitable Uses is not examinable,—the same being in the nature of a bill of review,—and there cannot be a bill of review upon a bill of review; such an objection does not apply to a proceeding brought to alter the regulations of a charity settled by the decrees of the Commissioners and confirmed in Chancery, in a case where no bill of review is necessary.

The jurisdiction of the Court as to charities under Sir *Samuel Romilly's* Act, in cases arising between the trustees and the objects of the trust, may be exercised according to the discretion of the Court, where it can be applied with justice to the parties and benefit to the charity. And, *semble*, the Act may safely be resorted to in cases where the objects of the charity have no distinct interests, and where, therefore, the Attorney-General properly represents them all, and in cases where, though there may be distinct interests, no substantial question of principle can arise between the several objects of the charity.

Where a summary jurisdiction is created by Parliament, it must be deemed to be the intention of the legislature (in the absence of any restriction) that the proceedings under it, when resorted to, shall have the same force and effect as the proceedings under the ordinary jurisdiction for which it is substituted.

There is no general rule against the admission of boarders in grammar schools; but the number of boarders admitted ought not to be such as in any manner to affect the admission of free boys, or the means of educating them to the best advantage, according to the provisions of the scheme.

Although there be reason to suspect that a school was in connexion with the Church of *England*, in the absence of any positive evidence confining the benefit of the charity to members of the Church of *England*,—the usage having been to admit the children of dissenters to the benefits of the school,—the question of their admissibility must be governed by usage.

The Commissioners appointed under the stat. 1 & 2 Geo. 4, c. 92, and the Bishop, having found that an exchange of the charity lands would be beneficial, and the same having been effected according to the statute, the Court has no power to reverse their decision; and it is immaterial that the Bishop was himself one of the trustees of the charity, the Bishop having no personal interest in the property.

AN information, at the relation of *G. Griffiths* and others, against the trustees of *Kidderminster* School, and against the head master, under master, and a retired under master of the school. It prayed a declaration that the whole income of the charity ought to be applied for the benefit of the school; that the free scholars ought not to be required to make any payments for their education; that, in the administration of the charity, children who, or whose parents, are members of the Church of *England*, ought not to have an



advantage or privilege over children who, or whose parents, are not members of the Church of *England*; and that all boys who can read and write are proper objects of the charity. The information also prayed the declaration of the Court, whether the masters of the school ought, or ought not, to be allowed to take boarders; and it prayed, that several orders which had been made by the Court in relation to the school might be discharged; and that it might be referred to the Master to settle a proper scheme for the general regulation and management of the charity, having regard to such declarations; and that an exchange of an estate belonging to the charity, called the *Greenhill* estate, for a house and estate called *Woodfield*, might be set aside, or that the Defendant, *William Cockin*, (the head master) might be decreed to make good to the charity the damage occasioned thereto by the exchange.

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The earliest notice of the foundation of the *Kidderminster* School is contained in an inquisition taken in the 9th year of Charles 1, by virtue of a commission under the great seal, according to the statute 43 Eliz. c. 4. By this inquisition it was found, that various parcels of land had been theretofore conveyed to the use and for and towards the maintenance of schoolmasters and a free school, for the education of children and youth in *Kidderminster* in good literature and learning. Upon this inquisition the Commissioners made a decree, whereby, after various provisions relating to the letting and the mis-employment of the rents of the land, which were described as belonging to the free school, they gave directions for the future regulation of the school, the qualification and government of the masters, and the application of the income of the charity (a). Some

(a) The Commissioners ordered and decreed that no person or persons should be admitted, elected, chosen, allowed, or approved of, to be schoolmaster or schoolmasters of the free school in *Kidderminster*, nor have any benefit, profit, wages, or stipend

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exceptions were taken to this decree, and were referred to the Commissioners for their consideration. The Commis-

belonging to the said school or master or masters of the same, but such person and persons as should wholly and altogether employ him and themselves as schoolmasters of the said school, and not employ him or themselves in any manner of other profession or business which might or should hinder, or in any way let or take away the continual attendance and diligence of such schoolmaster or schoolmasters upon the said school and the scholars therein; but that if any such schoolmaster or schoolmasters should in any way, or at any time, neglect the said school and their duty therein, then, and also upon any other reasonable cause, such schoolmaster or schoolmasters should be removed and discharged from being further schoolmaster or schoolmasters of the said school, and be deprived of all further profit, benefit, wages, or stipend belonging unto the said school or schoolmasters. They further ordered and decreed, that all the rents thenceforth to become due for the premises should be employed and bestowed in the necessary expenses of the school; and in buying necessary books for the schoolboys, 40s. per annum, or so much thereof as need should require; and the rest upon the schoolmasters for the time being, for their wages and stipend for their pains and diligence in the duties of their several places in teaching and instructing the youth and scholars there coming

to be taught and instructed; the payments to the schoolmasters to be at the rate of two parts to the high schoolmaster, and one part to the lower schoolmaster. They also ordered and decreed that no person or persons whatsoever should from thenceforth be nominated, elected, chosen, appointed, or approved, to be high or low schoolmaster or schoolmasters of the said school, but by the high bailiff of *Kidderminster* aforesaid for the time being, and certain of the feoffees of the premises for the time being, with the consent and approbation of the Bishop of *Worcester* for the time being, or of his chancellor for the time being; and that such person or persons so to be nominated, elected, chosen, placed, and approved to be schoolmaster of the same school, should be of good and laudable life, gesture, and conversation, painful, diligent, and industrious in his or their place and places of schoolmaster and schoolmasters as aforesaid, and should continue no longer schoolmaster or schoolmasters of the same school than he or they should so demean and behave themselves as aforesaid, in painful diligence and industrious manner in teaching and instructing the youth and scholars coming to the said school to be taught and instructed, without using or exercising or following any other vocation, profession, or business. The decree also contained provisions as to letting and rents, and appointed new

sioners certified in favour of some alterations in the decree as to several matters affecting the tenants; and the case having then come before the Lord Keeper *Coventry*, upon the exceptions and the certificate, he, on the 12th of June, in the 13th of Charles the 1st, made a decree, by which, according to the powers and authority in that behalf given to him by the statute, he ordered that the decree of the Commissioners, and all the matters therein contained, should be ratified and confirmed by the decree and authority of this Court, according to the alterations in the said certificate. The property of the charity was from time to time conveyed to new trustees; and in the year 1825 a scheme for the appointment of trustees of the charity was settled under an order of the Court. The Bishop of *Worcester* and his chancellor, and the high bailiff of *Kidderminster*, were always retained as trustees, in conformity with the decree of the Commissioners; and no alteration in the trusts declared by the decree appeared to have been made, or attempted to be made, down to the year 1842.

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By an order of the Court, dated the 18th of April, 1842, and made upon the petition of the then trustees, in the matter of the charity, under the title of "The Matter of the Free Grammar School of *Kidderminster*, in the County of *Worcester*," it was referred to the Master to approve of a scheme for the future regulation and government of the free grammar school, regard being had to the provisions of the Act, 3 & 4 Vict. c. 77 (a); and the Attorney-General, by his counsel or solicitor, was to be at liberty to attend the Master on the matter referred to him.

In pursuance of this order the Master made his report,

feoffees, and gave directions for the continuance of the trustees, and providing that the bishop for the time being and his chancellor, and the high bailiff of *Kid-*

*derminster* for the time being, should be three of the trustees.

(a) An Act for improving the Condition and extending the Benefits of Grammar Schools.

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dated the 19th of November, 1844, by which—after certifying that he had been attended by the solicitors for the petitioners and for the Attorney-General, and stating, that it appeared by an affidavit laid before him, that the yearly income of the charity estates was, in the year 1825, 491*l.* 19*s.* 1*d.*, or thereabouts; and that the then present yearly income of the charity amounted to 507*l.* 5*s.*, or thereabouts; and that certain leases would shortly fall in, when it was probable the income would increase considerably; that the school was then divided into two departments, the upper school and the lower school; that the number of free scholars attending the free school then amounted in the upper school to eight, and in the lower school to forty; and that the number of free scholars for many years past had not exceeded that number; but that if the school were placed under improved management and regulations, it was probable the number of scholars would be increased; that the Rev. *Thomas Morgan*, the then head master of the free grammar school, was of the age of eighty years, or thereabouts, and was willing to resign his office, on having a retiring pension, under the provisions of the Grammar School Act—he found that Mr. *William Fawkes*, the late under master of the school, was in the seventieth year of his age, and had resigned his office upon an understanding that he should be allowed a retiring pension of 100*l.* a year for life, under the provisions of the said Act. And he set forth, in the second schedule to the report, the scheme which he approved for the future regulation and government of the free school (*a*). The report

(*a*) The material provisions of the scheme set forth in the Second Schedule to the report were as follows:—Article 1 provided for a retiring pension of 150*l.* a-year to the Rev. *Thomas Morgan*, the late head master of the Free Grammar School, who, in the

meantime, had retired; and for a retiring pension of 100*l.* a-year to Mr. *Fawkes*, the late under master. Article 2 provided that the Bishop of Worcester for the time being should be the visitor of the Free Grammar School, and that the Vicar of *Kidderminster* for

was confirmed by an order of the 13th of December, 1844, and the scheme was directed to be carried into effect. This

the time being should always be one of the trustees of the school. Articles 3 and 4 provided for the application of the rents of the estates: in the first place, in payment of repairs, and of what should be necessary, in the opinion of the trustees or the majority of them, for books, not only for the service of the free grammar school, but also for prizes in books to be given at the yearly examination, with a proviso that the amount should not exceed 30*l.* per annum; and then, in payment of the retiring pensions, and of the salaries of the head and under masters, and of the clerk and collector, and other expenses after provided for; and directed the surplus to be invested and accumulated, subject to any directions to be given by the Court upon a proper application for the purpose. Article 6 provided that the trustees, or the majority of them, should, with all convenient speed, upon any vacancy, nominate for the approbation of the visitor an apt and able man in learning, manners, and discretion; and that, upon the approbation of the visitor, the trustees should elect him to be schoolmaster of the said school; and that they and the visitor should also in like manner elect and choose another able and discreet person to be under master or usher of the said school, such masters to be always respectively members of the Church of *England*, and the head master to be a graduate of an *English*

University, and also admitted into Holy Orders. Article 7 provided that the school should consist of 40 boys, to be nominated by the trustees, the children of the inhabitants of the borough or foreign of *Kidderminster*, members of the Church of *England*, being entitled to the privilege of being named or chosen; but that if at any time the number of 40 boys should not be made up by applications and nominations from the borough or foreign of *Kidderminster*, the deficiency might be made up from children of persons being of the Church of *England*, not residing within the borough or foreign. Article 8 provided that such scholars, when chosen, should be considered as free boys, and instructed in Latin and Greek, without charge or payment; and that they should further be instructed in history, geography, mathematics, writing, and other usual branches of education, on payment of 1*l.* each per quarter,—the payment to be made to the head master. Article 9 provided, that in addition to the 40 boys so to be named and educated, there should be admitted into the school such other boys as the trustees should from time to time nominate, sanction, and direct, being children of inhabitants of the borough or foreign of *Kidderminster*, who should receive the same education in all respects as the 40 boys or scholars, such additional scholars to pay not less than the sum

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order was made upon the petition of the then trustees, in the matter of the charity, under the same title as before; and the Attorney-General appeared upon the petition.

of 2*l.* per quarter to the head master, in such manner as the trustees should direct. Article 10 provided that the head master should, as and when required by the trustees, and subject to their consent and approval, appoint one or more assistant or assistants, other than the under master, who should, under the superintendence of the head master, instruct the scholars in history, geography, writing, arithmetic, mathematics, and other usual branches of education, the head master to pay such assistants such salaries as the trustees should deem reasonable. Article 11 provided that the schoolmasters should have the privilege of taking such a number of boarders into their houses for the purpose of receiving their education in the said school as the trustees, with the approbation of the visitor, should permit and approve of, such boarders always to receive their instruction in common with the free boys, such boys paying such sum as the trustees should direct and approve, but no other distinction to be made between the boarders and free boys in school-hours, or as to the privileges and enjoyments of the school, or in their discipline or treatment in any respect. Article 12 fixed the salaries of the schoolmaster and under master at the following minimum rates: the schoolmaster 300*l.* a-year and a house,

and the under master 100*l.* a-year and a house; and it assigned houses belonging to the school property to the schoolmaster and under master respectively, for their respective uses; and after reciting that the house assigned to the schoolmaster was small and insufficient for the accommodation of boarders, it provided that it should be competent to the trustees at any time, with the approbation of the visitor, to allow the master to reside in any other house within the precincts of the borough of *Kidderminster*; and that in such case the trustees might let the master's house, and permit the master to receive the rents thereof, to enable him the better to provide for himself and his boarders a larger house. Article 13 laid down the rules and regulations for the conduct of the school, amongst which were the following: That the business of the day in the school should commence and end with the prescribed forms of prayer, to be approved of by the visitor for the time being; and that such a portion of Saturday in each week as might seem proper to the master, should be devoted to the instruction of the respective scholars in the principles of the Christian religion, and the doctrines and rites of the Church of *England*; that all the scholars, except as thereafter mentioned, should repair to the parish or some other

Upon the retirement of the Rev. *T. Morgan* from the head mastership of the school, pending the above proceedings, and on the 21st of February, 1843, the Rev. *W. Cockin* was elected to be head master in his place. And in some circulars which appear to have been issued for the information of candidates, with reference to the election, it was stated that the master would be allowed to take any number of boarders the house would accommodate; that the school was open to the parish at large; that there was no payment with scholars; and that the course of education was classical and mathematical. The number of free pupils in the school was also stated, and it was mentioned that there were at that time no boarders. Mr. *Fawkes*, the under

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church of *Kidderminster* twice every Sunday, and on such of the days set apart for public worship as the trustees should from time to time direct; and that the head or under master should attend the boys at church on every occasion; with a proviso that the trustees might excuse by a note in writing any boy or boys from such attendance, upon request made to them by the parents of any such boy or boys, and that such persons so excused should not be compelled to attend church morning or evening. That no boy should be admitted into the school who was less than eight, or more than sixteen years of age. That there should be a yearly examination by an examiner appointed by the visitor, who should report to the trustees, and also to the visitor, the state of improvement and proficiency of the scholars, and the general state of the school, and also recommend such as were sufficiently advanced to be drafted into the

upper school; and that in case the visitor should approve of the recommendation, the same should be forthwith adopted. Article 15 gave power to the trustees to appoint a clerk and a collector, with salaries. And article 21 was as follows:—That inasmuch as there had been, previous to that time, a number of boys and scholars not receiving any education in Latin and Greek, who had been instructed in reading, writing, and arithmetic, without charge or payment, and it was desirable that they should not be deprived of the advantage thus afforded them, the trustees should have the power to allow them to continue at the said school without any payment, except the mere payment quarterly for stationery, until the 25th of March, 1845, when the said school was to cease; but the scholars thereof to have the privilege of becoming scholars of the free grammar school, under the terms of the scheme.

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master of the school, having also retired from his office, as stated in the report, on the 25th of March, 1844, the Rev. *Edward Brine* was appointed under master in his place.

Soon after Mr. *Cockin* was appointed to be head master of the school, and in the month of September, 1843, he purchased a house in the borough of *Kidderminster*, called *Woodfield House*, with about nine acres of land attached to it, and fitted up the house for boarders. It appears to have been made capable of accommodating about fifty boarders; and under the 12th article of the scheme, Mr. *Cockin* was allowed to reside in this house, and had ever since resided in it, and taken boarders there. The house and lands thus purchased by Mr. *Cockin* were, in the year 1848, exchanged by him with the trustees of the charity for another estate in the parish of *Kidderminster* belonging to the charity, and called the *Greenhill* estate, containing about 50 acres. This exchange was effected under the powers of the Act, 1 & 2 Geo. 4, c. 92 (a), for authorising the exchange of charity lands; and all the provisions of the Act appeared to have been duly observed, including the valuation required by it. The exchange was completed by a deed, dated the 3rd of February, 1848, by which the *Woodfield* estate was conveyed to the trustees of the school, and the *Greenhill* estate to Mr. *Cockin*. And Mr. *Cockin* afterwards sold the *Greenhill* estate.

Although Mr. *Cockin* was thus permitted to reside in *Woodfield House*, it appeared that the school continued down to this time to be carried on, as it had before been, in an old building adjoining the parish church, and which was not included in any of the deeds by which the charity property was conveyed. In this state of circumstances the Vicar of *Kidderminster* came to an agreement with his co-

(a) An act to authorise the exchange of lands, &c., subject to trusts for charitable purposes, for other lands, &c.



trustees, that the trustees should give up possession of the building adjoining the parish church, upon the terms of his erecting a new school-room adjoining *Woodfield House*, at an expense of not less than 1200*l.*; and thereupon, on the 7th of March, 1848, Mr. *Cockin* and the vicar presented a petition to the Court in the matter of the charity, under the same title as before, stating the exchange, and the agreements; and that by reason thereof it was desirable that a reduction of the salary of the head master should be made; and that for that purpose an alteration of the scheme would become necessary; and praying that the agreement between the vicar and the trustees might be confirmed; and that it might be referred to the Master to examine and approve of a new scheme for the future regulation and government of the free grammar school, regard being had to the provisions of the Grammar School Act.

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By an order made upon this petition, and dated the 10th of March, 1848, it was referred to the Master to inquire whether it would be fit and proper, and for the benefit of the charity, that the agreement should be carried into effect; and this order also referred it to the Master to approve of a new scheme, in the terms prayed by the petition. In pursuance of this order the Master made a report, dated the 4th of November, 1848, by which, after certifying that he had been attended by the solicitors for the petitioners and for the Attorney-General, he approved of the agreement, and of a new scheme for the regulation and government of the school. The scheme approved of by this report was in substance the same as that which the Master had approved by his former report; the only material variations being, that the head master was to have 240*l.* a-year, and *Woodfield House* and grounds, instead of his salary of 300*l.* a-year; that the under master was to have, in addition to the house which had been before assigned to him, the house which by the former scheme had

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been assigned to the head master; and that the school was to be carried on at *Woodfield House*. This report was confirmed by an order of the Court, dated the 17th of November, 1848.

The school was conducted upon the footing of the schemes, from the times they were respectively in force. It had sunk to a low ebb at the time of Mr. *Morgan's* retirement, there being then only seven free boys in the upper school, and no boarders. Upon the appointment of Mr. *Cockin* to the head mastership in 1843, it rose considerably; and when Mr. *Fawkes* retired at Lady Day, 1844, there were sixty-three free boys in the school, of whom thirty were in the upper school, where Greek and Latin were taught, and thirty-three in the lower school, where the instruction was in English only. The number of free boys appeared to have still further increased in the year 1844; during part of which year there were forty boys in the upper school. After the year 1844 the number of free boys gradually decreased; and at the time of the filing of the information (1849) there were only thirteen free boys in the school. The number of boarders on the other hand had gradually increased; and when this information was filed, there were thirty-nine boarders in the school.

At the time when Mr. *Cockin* was appointed to the head mastership, no payment was required from the free boys for their education; but from Michaelmas, 1843, the free boys in the upper school were, by the direction of the trustees, required to make a quarterly payment to the head master for instruction in English and other branches of education, Latin and Greek only being taught free of charge. It was admitted by the information, that, before Mr. *Cockin's* appointment, small payments, varying from 2s. 6d. to 5s. a quarter, had sometimes been required to be made in respect of writing and arithmetic. Until the adoption of

the scheme of 1844, the free boys admitted to the school were not limited either as to age or number, but all boys who could read were admitted into the school. No distinction appeared to have been made as to the children of dissenters, of whom there are a considerable number amongst the inhabitants of *Kidderminster*.

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Many of the inhabitants of *Kidderminster* being dissatisfied with the scheme of 1844, a public meeting of the inhabitants was held on the 1st of December, 1848, at which resolutions were passed, condemning that scheme in the particulars complained of by the information, and in other respects; and it was resolved to petition the Lord Chancellor, and the bishop of the diocese, as visitor; and a committee was appointed to watch the interests of the school, to take proceedings in equity or otherwise, and to dispose of the subscriptions of the parishioners to defray the expenses thereof. A memorial was accordingly presented to the Bishop of *Worcester*, as visitor, which having failed of effect (a), the information was filed in February, 1849.

(a) The evidence proved that the meeting was attended by about 1600 persons. The principal grounds of complaint alleged by the memorial were—the quarterly payments charged by the scheme upon the free boys, the non-exercise by the trustees of their power to limit the number of boarders, and the non-distribution of the 30*l.* a-year in books and prizes. The Bishop answered this memorial on the 13th of January, 1849, to the effect, that, the quarterly payments being imposed by the scheme, the alleged grievance in that respect was not within his jurisdiction as visitor; that he should not feel

himself justified in interfering as visitor with the discretionary power, which by the scheme was reserved to the trustees, of limiting the number of boarders; and that, it having been proved before him that the funds of the school were not adequate to meet the 30*l.* per annum, the only direction he could give respecting it was, that it should be applied according to the scheme, whenever there was a sufficient surplus, after paying the salaries of the masters and other school expenses. The Bishop's answer to the memorial went on to state that grammar schools, such as that at *Kidderminster*, were not intended

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In addition to the above facts in relation to the school, the information alleged, that the rental of the charity estates had increased since the report in 1844, to 795*l.* per annum, and would, from the falling in of leases and other causes, be hereafter considerably increased; that, at the times when the above petitions were presented, it was known by the parties presenting them, that many of the inhabitants of *Kidderminster* would not approve of the schemes set forth in the reports; and that the petitions were presented without the inhabitants being consulted, in order, if possible, to prevent questions being made as to the propriety of the schemes: that it was the intention of the founders of the school, as set forth in the inquisition and decree, and was required by the decree, that the school should be a free school, and that the benefits thereof should be enjoyed by free scholars only; and that it was contrary to the intentions of the founders, that there should be any boys in the school whose parents should pay towards their education therein; and that no payment ought to be made by the free scholars for instruction in history, geography, and mathematics, writing, and other branches of education; but that all such branches of education were comprised in and formed part of the good literature and learning for the instruction of boys for which the charity was founded, or at all events ought now to be included in the gratuitous education, which was an essential part of the charity. That the provisions contained in the scheme for the instruction

for the general education of the inhabitants of towns, but were exclusively instituted for the purpose of affording opportunities for a good classical education to the sons of merchants, tradesmen, and others, evincing an aptitude for learning. That the scheme had conceded this privilege to the inhabitants of *Kidderminster* on

payment of 1*l.* per quarter, which was a trifling charge for such an education; and that it was not for him as visitor to decide whether it would have been more advisable that such education should have been afforded to the inhabitants gratuitously, as the point was settled by the scheme.

of the boys in the doctrines and rites of the Church of *England*, and for the attendance of the boys at church, and for giving a preference to boys being children of members of the Church of *England*, and for the non-admission of boys under eight years of age, and the payments required by the schemes to be made by the scholars, called free scholars, to the head master, had prevented and would, unless the schemes were altered, continue to prevent many deserving and proper objects of the charity from receiving the benefit thereof; and that in fact some boys, who had applied for admission to the school, had been rejected, because their parents were not members of the Church of *England*, and other boys had, in consequence of the payments required, been obliged to discontinue receiving the benefit of the charity, and to be sent to other schools supported by subscription. The information alleged, that the boarders had been allowed to compete with the free scholars for the prizes which were annually distributed, in conformity with the provisions of the scheme; and that, in consequence of the greater time and care devoted to their education, they had succeeded in gaining nearly all the prizes; and that, in the year 1848, they had obtained twenty-one out of twenty-four prizes. That the success of the boarders, as to the prizes, occasioned ill feeling among the scholars, and was disliked by parents who had sent, or might be willing to send, boys to the school. That the inhabitants of *Kidderminster*, being nearly all persons in trade, were unable to send their boys to the school as boarders, not only on account of the expense, but because the head master considered a tradesman's son objectionable as a boarder; and that the revenue of the school exceeded 700*l.* a-year, and was sufficient to provide good and efficient masters to instruct the free scholars, in conformity with the decrees, without resort being had to the taking of boarders; and that the masters, by the taking of boarders, obtained a

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much larger income than was necessary for the masters of the school.

The allegations of the information as to the exchange were, that it was made with a view to Mr. *Cockin* taking a larger number of boarders, and providing for him a larger house for that purpose; and that it was improvident, except on the assumption that it was in furtherance of the intention of the founders of the charity, or that it was otherwise justifiable to provide for the head master, out of the trust property, a house sufficiently large to accommodate a larger number of boarders. That, by reason of the exchange, the revenue derived from the charity estate would be permanently diminished, or at least rendered more precarious. That the charity estate given in exchange was land let for agricultural purposes, and much more desirable property for the charity than a property consisting principally of a house; that it was land, which, from its peculiar position, was likely to increase considerably in value, and which it was known would, on the determination of the existing leases, produce a greatly increased rental. That the exchange never would have been made had not Mr. *Cockin* been desirous of having a larger house, wherein he might take a large number of boarders; that the old house of the head master was sufficiently large for him and his family, and was then occupied by a large family, who had two boarders living with them; and that notices had been given before the exchange was effected, that the exchange, if made, would be set aside.

The information charged, that the orders of April, 1842, and March, 1848, ought not, under the circumstances, and having regard to the decrees, to have been applied for upon petition, and ought not to have been made; and that there was no jurisdiction in the Court to make such orders as the orders confirming the reports.

The trustees, by their answer, stated the present annual rental of the charity estates to be 579*l.* 18*s.* 6*d.*; and that they believed, that by the falling in of leases the rental would be increased in 1851, and again in 1856. That they were advised, that the free school, according to its foundation, was not a school for the teaching of writing and arithmetic, but for educating scholars in the learned languages and grammar only; that it appeared from orders and entries in ancient minute books in their possession, that payments or quarterages by scholars attending the free school, had always been accustomed to be made; but that such payments or quarterages had never been made for the education the boys were entitled to receive at the free school; that neither formerly, nor at present, was any payment made by a free scholar for the teaching of Latin and Greek, but solely and exclusively for instruction in writing, arithmetic, and English literature. They said they believed, that the only (a) gratuitous instruction ever given in the said free

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(a) The answer set forth the following entry in an ancient Minute Book of the school, purporting to be resolutions agreed to at a meeting of the trustees, of the 2nd of October, 1756:—That the usher or low master of the school should be well qualified for teaching Latin and grammar in the school, according to the original institution thereof, as also writing and arithmetic therein, in an accurate and competent manner. That the said usher or low master should not be obliged to teach writing and arithmetic in the said free school, unless the parent, guardian, or friend of the child or children there sent to be taught the same shall, previous to such instruction in writing and arithmetic, engage and promise to pay to such master for such

learning, as the original institution was only for teaching Latin and grammar in the said school, the sum of 5*s.* per quarter, including pens and ink for the said scholars. And also another entry in the same book, and dated the 23rd of December, 1777, as follows:—"Entrance money of 5*s.*, to be paid to the under master, and that he has a right to receive the same."

The answer of the Master also stated an entry in the Minute Book, under the date of the 6th of June, 1768, limiting the number of boys to be taught by the second master to twenty; and another entry, under the date of the 23rd of December, 1773, prescribing the payment of an entrance fee to the under master of 5*s.*

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school, consisted of instruction in Latin, Greek, and grammar only; and they denied, to the best of their belief, that it was ever the practice of the school to give to the scholars gratuitous instruction in reading, writing, and arithmetic.

With respect to the petitions, the trustees admitted that the inhabitants of *Kidderminster* were not consulted on the presentation of them; but they said, that the petitions were presented with the approval, and by the direction of the trustees; and that the proceedings upon them were matters of notoriety in the town; and that the Attorney-General attended by counsel on the proceedings before the Master for the settlement of the scheme. With respect to the religious qualification, and the other provisions of the scheme relating to religious instruction, they said the Bishop of *Worcester* had always been the visitor of the school, and one of the trustees. That the head master of the school had always been a clergyman of the Church of *England*; and that the free scholars of the school had always, time out of mind, attended the parish church; and that, from such circumstances, they had always considered and believed that the free school was a charity in connection with the Church of *England*; that they did not, however, propose or suggest before the Master, that the free scholars should be confined to the children of the inhabitants of *Kidderminster* being members of the Church of *England*; but that the counsel for the Attorney-General insisted before the Master, that the free school was a Church of *England* foundation, and that the benefits of the school should be confined to the children of the inhabitants of *Kidderminster* being members of the Church of *England*; and that the Master was of the same opinion, and consequently approved of the scheme with such limitation. They stated, that they were anxious and willing to act as the Court should direct, and were willing to consent to an alteration



of the scheme, so that the benefits of the charity might be extended to the children of all the inhabitants of *Kidderminster*; but they submitted, that, having regard to the ancient practice in the school, and to the constitution of the school, the boys attending the school ought to be instructed in the doctrines and rites of the Church of *England*, and ought, at the discretion of the head master, to attend at church, or, at all events, that the religious instruction of the boys ought to be left to the head master.

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With respect to the charges for education, the trustees said, that the school had always been and was a free school for teaching the learned languages and grammar, and that no charge ever had been or was made for such instruction; and that, from the inquisition and decree, and the ancient usages of the school, they believed that it was the intention of the founders, that the parents of the free scholars should not pay anything for instruction in good literature and learning, by which (they submitted) was meant and intended instruction in Greek, Latin, and grammar: and they submitted, that the head master was not required, according to the constitution of the school, to give gratuitous instruction to the free boys in any other branch of education except Greek, Latin, and grammar, and that such had always been the practice in the said free school, and in all other free schools similarly constituted; and they therefore submitted, that payment ought to be made by or for the free scholars to the head master, for instruction in history, geography, and mathematics, and all other branches of education, except Greek, Latin, and grammar. The trustees also said, they were advised and submitted, that, having regard to the ancient usages of the school, and to the universal practice of free schools similarly constituted, and founded at or about the same period, the branches of education in the information mentioned did not form part of

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good literature and learning, for the instruction of boys, for which the charity was founded.

With respect to the ages for admission, they submitted, that the school was intended for the purpose of affording a classical education; and that it would not be useful or advantageous to the principal objects of the charity to admit children of tender years; that some age ought to be fixed for the admission of free boys; and that the age of eight years was a fair and proper age for such admission.

With respect to the prizes, the trustees said, that none had been distributed in conformity with the powers of the scheme, the income of the charity not having been sufficient to supply funds for the purpose; but that, since the head master's appointment, books, as prizes, had twice in every year been provided at the exclusive expense of the head master and the under master, and two other persons who took an interest in the prosperity of the school; and that the free boys had always been permitted to compete with the boarders for such prizes; and that, during the period that the prizes had been distributed, sixty-one of such prizes have been obtained by boarders, and fifty-one by the free scholars; and that, although in the year 1848 the boarders obtained twenty-one out of twenty-four, yet, that on many previous occasions the free scholars obtained the greater proportion of the prizes; that the prizes had always been fairly distributed; that the success of the boarders as to prizes occasions no ill-feeling among the scholars, and that no such ill-feeling had existed or did exist; and that the great majority of the parents of the free scholars approved of the system of distributing prizes, as promoting greater competition among all the boys attending the school.

With respect to the boarders, they said, that although masters of average ability might be obtained for the sala-

ries provided by the scheme, yet, that schoolmasters of high reputation and character would not be induced, by such remuneration only, to accept the office of head master of the free school; and that they believe that it was greatly for the advantage and interest of the charity that men of high character and reputation, from one of the Universities, should be induced to accept such office; and that the present head master would not have accepted such office upon the remuneration which could have been provided solely from the income of the charity; and they therefore believed that the revenue of the school was not sufficient to provide good and sufficient masters to instruct the free scholars, in conformity with the decrees, without resort being had to the taking of boarders; and they said, that, in their judgment and belief, the taking of boarders by the master was greatly to the advantage and interest of the free school, by exciting competition among the boys, and raising the character and reputation of the school; and, for those reasons, they submitted, that the masters should not be prohibited from taking boarders. The trustees submitted, that, except as to admitting to the benefit of the free school children of the inhabitants of *Kidderminster*, whether members of the Church of *England* or not, the existing scheme, having been settled under the authority of the Court, and with the express sanction of the Attorney-General, represented by the counsel attending for him before the Master, ought not to be altered.

As to the exchange, the trustees stated, that the old school room, being an ancient building attached to the church, confined in space, and quite unsuitable for the purposes of a school-room, not only being in a dilapidated state, but surrounded by a crowded church-yard, they considered, as trustees of the school, that it would be greatly for the advantage of the charity, that a permanent and fit and proper residence for the head master of the school

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should be obtained by them, and that a new and commodious school-room should be built, which should be attached to the head master's house. They stated in detail the proceedings relating to the exchange, and that it was completed under the provisions of the statute; and that a large and commodious school-room had been subsequently built adjoining *Woodfield House*, at a cost of upwards of 1200*l.*; and that the room had been used for the purposes of the school since in or about June, 1848. They said, that it was, in their judgment, for the advantage of the charity, that the house of the head master should be capable of accommodating boarders; and that they would not have effected the exchange, unless the house had been suited for such purposes; but they deny that the exchange was improvident in any respect. And they set forth various particulars relating to the two properties, from which it would appear, that the income applicable for the purposes of the school was increased by the exchange. They stated, that, before the exchange was effected, they advertised the meeting held by the Commissioners under the Act in the *Kidderminster* newspaper, for the express purpose of giving an opportunity to any inhabitant to attend and object. That the solicitor of the relators was the only inhabitant who attended; that he stated, that he attended for several inhabitants, but refused to state for whom, and ultimately insisted on his right to attend in his own behalf; and that he protested against the exchange; that the Commissioners then invited him to offer any evidence, or to make any statement he thought fit; but that he offered no evidence, and gave no reason why the exchange should not be effected.

By their answer to the amended information, the trustees stated the present clear rental of the property, after deducting the former under-master's pension, the salaries of officers, rates, taxes, repairs, and losses by tenants, to

be 351*l.* 12*s.* 1*d.*; and they set out a schedule of the prizes, from which it appeared, that since 1846 by far the greater proportion of prizes had been obtained by the boarders.

The answers of the master and under master were to the same effect as those of the trustees. The master stated, that the regulations of the scheme had not been enforced as against the children of parents dissenting from the doctrine of the Church of *England*; and that he was not desirous of excluding dissenters from the benefit of education at the school. And he submitted, that, as he became master on the understanding that he was entitled to take boarders, and such understanding had been twice assured to him by the schemes approved by the Court, and he had, on the faith of it, incurred very considerable expenses in providing for the reception of boarders, he ought not to be prohibited from taking them. He stated, that both Mr. *Morgan* and Mr. *Fawkes* had formerly taken boarders, although they had ceased to do so before they retired from their offices. He stated also, that he had sold the *Greenhill* estate. The under master by his answer stated his belief, that many of the inhabitants of *Kidderminster* were dissatisfied with the scheme; and that the payments required to be made by the scholars prevented some proper objects of the charity from receiving the benefit thereof.

The evidence was voluminous, but the conclusion of the Court upon the questions of fact appears upon the judgment; the brief abstract of the evidence in the subjoined note (a) will be sufficient to shew the circumstances upon which the discretion of the Court was appealed to, and to which it was applied.

(a) In support of the information, two surveyors stated that the net rental of the property, exclusive of the parts used as the school and the masters' houses, ought, if well managed and let to the best advantage, to be 898*l.* 4*s.* 3*d.*; that the exchange of *Greenhill* estate for the *Woodfield House* and land, if taken as

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one estate for the other, was an improvident exchange for the trustees; that the *Greenhill* estate was eligibly situated for garden ground and villas, and was calculated to produce an increase of income to the trustees; that the land was four times more valuable in quality than the land at *Woodfield*; that *Woodfield House*, unless occupied by the master of the school, would be difficult to let, unless at a very moderate rent. They set the *Greenhill* estate at 200*l.* a-year if occupied as garden ground, and 400*l.* a-year if let for building. The Court was of opinion that the witnesses examined on the part of the informant in relation to the school, satisfactorily proved that there had been at different times from 40 to 50, and even 60 boys, receiving their education at the school; that the boys were the sons of the tradesmen and shopkeepers in the town; and that, until the scheme of 1844 came into operation, boys were admissible into the school at any age, if able to read; and that there was no distinction as to the children of dissenters. Many of the witnesses stated, that at different times the under master had a few boarders, not, however, at any time exceeding six in number. It also appeared from the evidence of several of the witnesses, that small payments were made by the boys for books, pens, and ink, and other incidental matters; but they all concur in stating that, until the scheme of 1844, no

payment was made for education at the school. Several of the witnesses stated that the number of boys attending the school increased upon Mr. Cockin being first appointed, but again diminished upon the scheme coming into operation; and they ascribed the change to the rules introduced by that scheme, particularly to the rules as to the age of the boys and to the quarterly payments, and the religious qualification; several of the witnesses stating that they have been prevented by those rules from sending their children to the school; and some of them deposing, that they had been compelled to withdraw their children from the school in consequence of the quarterly payments. One witness stated that his boy, who had been admitted to the school at the age of seven, was refused admission after the scheme, because he was three weeks under eight years of age. Another, a dissenter, having a boy at the school, stated, that about the time of Mr. Cockin's appointment, she was told by the vicar that the school was intended for church-boys, and not for dissenters; and that her boy must leave unless he paid 2*l.* a quarter; and another stated, that the vicar told her that the school was made a grammar school, and advised her not to send her boy there, as he was intended for trade. Several of the witnesses stated, that the system of the masters' taking boarders also oper-

Mr. *Roundell Palmer* and Mr. *Bigg* for the defendants, the trustees.

ated to prevent the parishioners from sending their boys to the school, the parents considering that the boarders were better attended to than the free boys; and that impression had been increased by the boarders getting so many of the prizes. Two of the witnesses stated, that the free boys were not allowed to mix with the boarders; and one of them said, that they were put to sit on a form by themselves, and were not taught the same as the boarders, were kept to fewer books, and had not the same treatment. The informant proved a letter from Mr. *Cockin* to Mr. *Griffith*, one of the relators, with reference to his sending his son to the school as a boarder; in which Mr. *Cockin*, in advising that the boy should not be sent as a boarder, assigned as one of the grounds, that *Griffith's* being in business in the same town would, he feared, operate prejudicially to the boy amongst his companions. The informant also proved notices to the trustees before the exchange was completed, that proceedings would be taken to set it aside, if carried out.

The evidence on the part of the Defendants was for the most part documentary:—1. Minutes of the proceedings of the trustees from the year 1704, throughout which Minutes the school was called the Free Grammar School. The entry of the 2nd of October, 1756, contained, in addition to what was stated in the answer,

the following provision: "That the person to be elected into the place of usher or lower master shall, previous to his election thereto, be bound in a bond of 500*l.* that he will as well teach Latin and grammar, as also writing and arithmetic in the said school." Under the date 6th of June, 1768, the following order appeared: "Ordered, that *F. Hemsell*, the usher of the said grammar school, shall receive into the said school twenty boys, inhabitants of the borough or foreign of *Kidderminster*, such boys to be elected by a majority of the said trustees, whose respective ages shall not be less than seven years; and that the said *F. Hemsell* shall receive and continue the said boys in the said school, and there teach and instruct them in reading, writing, arithmetic, and grammar, for any term or time not exceeding the term of two years, without demanding or receiving any reward or gratuity for the same;" with provisions for keeping up this number of twenty boys. Under the date 23rd of December, 1787, an order for the appointment of an under master, made at a meeting of the trustees, stated as follows: "At the said meeting it was also agreed by the under mentioned feoffees, that the sum of 5*s.* shall be taken by the said under or lower master, as entrance into the said school, for every boy sent there to be taught; and that the said under master

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has a right to require from each boy now being or coming to be taught in the said school, the like sum of 5*s.*" Under the date 19th of June, 1787, an order appointing an under master, on condition of his entering into a bond, obliging himself to teach the scholars of the said school not only grammar, but writing and arithmetic, at the discretion of the trustees or feoffees. Under the date 26th of October, 1796, an order, by which, after reciting a representation of the under master, that his salary was insufficient for the support of his family; and stating, that from the number of boys attending the school for instruction in writing and arithmetic, and his diligence therein, he deserved every proper encouragement the trustees could give him, they consented that he should receive of the parents of such boys as were sent to the school, a quarterage of 2*s.* 6*d.* for such boys only as were instructed in writing and arithmetic, to continue till otherwise ordered by the trustees. 2. Memoranda signed by masters of the school, upon their election and resignation, dated in the years 1687, 1696, and 1697, in which the school is called "the Free Grammar School." 3. Leases of property belonging to the school from 1580 to 1809, in all of which, down to about 1704, the school is called "the Free Grammar School," except in two instances, in 1675 and 1689, in which it is called "the Free

School," and in all of which, subsequent to 1704, the school is called "the Free Grammar School," except in four or five instances between 1720 and 1730. This documentary evidence was produced by the trustees. Their clerk proved, that one of the relators objected before the Bishop, that the trustees, though prohibited by the scheme from doing so, had admitted children of dissenters to the school. The same witness proved, that the gross income of the charity property, exclusive of the masters' houses, was, in 1848, 597*l.* 8*s.* 6*d.*, and in 1849, 579*l.* 18*s.* 6*d.*; and that the net income of the charity property applicable to the school, after deducting the late under-master's pension, salaries of officers, repairs, insurance, and loss of rent, was, in 1848, 430*l.* 0*s.* 8*d.*, and in 1849, 351*l.* 12*s.* 1*d.*; that there was no surplus applicable to prizes, the charity being in debt to its treasurer. He further proved the increased rental obtained by the charity by means of the exchange, as stated in the answer; and he stated, that 5*s.* a quarter was theretofore payable by each scholar, for being taught writing and arithmetic; and that if more or less than that sum had been taken or required, it had been done without the sanction of the trustees.

Another witness proved, that, when he went to the school in 1787, 2*s.* 6*d.* or 5*s.* was paid as entrance money; and that, whilst



Mr. *Craig* for the Rev. *E. Brine*, the under master.

Mr. *Rendall* for Mr. *Fawkes* the retired under master.

In addition to the cases mentioned in the judgment, the following authorities were cited,—On the character of the foundation as a grammar school: *Attorney-General v. Earl of Mansfield (Highgate School)* (a);—On the general regulation of the school, and particularly on the question as to permitting the master to take boarders: *Attorney-General*

he continued at the school, 5s. a quarter was paid to the under master for his instruction in reading, writing, and arithmetic, independent of charges for stationery, &c.; but that when he got into the upper school nothing was paid to the upper master for his instruction in Latin and Greek; and he proved that the same payments as were made when he was at school, had been made by him for three of his sons, who went to the school in the years 1817, 1820, and 1826. The trustees also examined Mr. *Cockin* as a witness on their behalf, and he proved that no part of the income of the charity had been applied in providing the prizes distributed since he had been master. That there had been 172 prizes so distributed, of which, 64 had been awarded to free scholars, and 108 to boarders; that the course of education consisted of instruction in classics, mathematics, ancient and modern history, geography, and general branches of information; that this course was pursued throughout the school, the division into upper and lower schools having been

abolished; and that no distinction whatever was, or had been, since the admission of boarders,ceived in the school by the board-made between the educationers and that received by the free scholars or town boys, all joining in the same classes, according to their respective ages and attainments, and being taught together. It was also proved on the part of the trustees, that the words "being of the Church of *England*," contained in the scheme of 1844, and by which the children of dissenters were excluded from the school, were introduced by the Master; and that the introduction of them was objected to by the trustees; and it was also proved on the part of Mr. *Cockin*, that he bought *Woodfield House* and land in 1843, for 2875*l.*; and that he expended upon the house, in permanent improvements, 300*l.* or 400*l.* in 1843, and about 850*l.* in 1846; and that the school buildings erected there have cost between 1700*l.* and 1800*l.*; and that he sold the *Greenhill* estate in 1848 for 4200*l.*

(a) 2 Russ. 501.

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*v. Hartley (Bingley School) (a), Attorney-General v. The Coopers' Company (Egham School) (b), Attorney-General v. The Earl of Clarendon (Harrow School) (c), Attorney-General v. The Corporation of Ludlow (d);—On the points raised as to the religious instruction of the scholars, and the admission or exclusion of dissenters: Attorney-General v. Cullum (e);—On the jurisdiction of the Court, in the circumstances of the case: The Marquis of Breadalbane v. The Marquis of Chandos (f), Thompson v. Derham (g), Henderson v. Henderson (h);—And especially on the effect of the summary jurisdiction, upon petition under Sir Samuel Romilly's Act (52 Geo. 3, c. 101), and the Grammar School Act (3 & 4 Vict. c. 77): Attorney-General v. Green (i), In the Matter of the Charity of W. Phillipott (k), The Bailiffs, &c., of Ludlow v. Greenhouse (l), Hyde v. Edwards (m), In the Matter of the Shrewsbury Grammar School (n).*

*Nov. 8th.*  
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*Judgment.*

The VICE-CHANCELLOR, after stating the facts upon the pleadings and evidence:—

The information seeks relief, first, as to the regulation of the school; secondly, as to the transaction of the exchange. I propose to consider the case, first, with reference to the school.

Upon this part of the case, it was first argued, in support of the information, that the orders upon petition, which have been made by the Court in relation to the school, and

- (a) 2 J. & W. 353.
- (b) 19 Ves. 186, 191.
- (c) 17 Ves. 491.
- (d) 2 Ph. 685.
- (e) 1 Y. & C. C. C. 411.
- (f) 2 My. & Cr. 711.
- (g) 1 Hare, 358.

- (h) 3 Hare, 100.
- (i) 1 J. & W. 303.
- (k) 8 Sim. 381.
- (l) 1 Bligh, N. S., 17, 66.
- (m) 1 Mac. & G. 410.
- (n) Id. 324.

the schemes which have been settled under them, ought for several reasons to be wholly disregarded; and that the case ought now to be determined as if no such orders had been made, and no such scheme settled. The argument on this point was made to rest on three grounds: first, that the decree of the Court confirming, with modifications, the decree of the commissioners of charitable uses, precluded the Court from dealing with the case upon petition; secondly, that the case did not fall within the provisions of Sir *Samuel Romilly's* Act, 52 Geo. 3, c. 101; and thirdly, that it was not reached by the Grammar School Act, 3 & 4 Vict. c. 77. It was said, as to the first of those grounds, that the decree of the Court, following upon the decree of the Commissioners of Charitable Uses, was final and conclusive; and the case of *Windsor v. The Inhabitants of Farnham* (a) was cited in support of the proposition. As to the second ground, it was said that Sir *Samuel Romilly's* Act did not extend to empower the Court in any manner to alter or affect what had been settled by the decree of the Court; and as to the third, that the school was not a grammar school; and that, if it was, the same restriction as was applied to Sir *Samuel Romilly's* Act ought to be applied to the summary jurisdiction created by the Grammar School Act.

I am of opinion, that the orders and schemes in question cannot be thrown out of the case upon any of these grounds. As to the first ground, the case referred to, (which was cited from Croke Charles, p. 40, but is better reported in Duke 634), has indeed decided, that the decree of the Chancellor, following upon the decree of the Commissioners of Charitable Uses, is not open to a bill of review; one reason assigned, which appears in both of the reports, being, that the Chancellor's decree, in such cases, takes its authority from the statute, and that the statute mentions only one examination by the Chancellor; in effect, that the de-

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(a) Cro. Car. 40; S. C., Duke's Char. Uses, 634.

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cree is under the statutory, and not the ordinary jurisdiction; and another reason, which appears in the report in Duke only, being, that the appeal to the Chancellor, given by the statute, is of itself in the nature of a bill of review; and that there can be no bill of review upon a bill of review. The latter reason appears to me the most satisfactory one, for it is difficult to see how, upon any other ground, it can be, that the decree, in such cases, should not be subject to review, and yet should be open to appeal, as the case itself decides it to be; but this case, although the facts of it do not appear, was evidently one in which the decree could not, according to the ordinary course of the Court, have been altered except upon bill of review; and I see no ground for applying the same rule to cases in which, according to the ordinary course of the Court, no bill of review is necessary for enabling alterations to be made. The decree of the Commissioners in this case does not, I think, go further than to regulate the charity. The Lord Chancellor's decree does not even alter the regulations. This Court is in the constant habit of altering schemes which have been settled under its decrees, as the alterations of times and circumstances have required; and it has frequently done so upon petition in the causes in which the decrees have been made; and I do not think that the power of the Court to make such alterations can depend upon the character in which the decree has been made by the Lord Chancellor. The Court does not appear, in the *Attorney-General v. Bovill* (a), to have felt any difficulty in interfering with the Commissioners' decree; and although their decree in that case does not appear to have been brought under review before the Lord Chancellor, I think the same principle applies, and I have no difficulty in following the precedent.

The power of the Court to make alterations as times and circumstances require, in schemes settled by its decrees for the management of charities, does not depend upon the character in which the decree has been made by the Lord Chancellor.

As to the second ground, that the case did not fall with-

(a) 1 Ph. 762.

in Sir *Samuel Romilly's* Act, I have referred to the Act, and the cases which have been decided upon it. The terms of the Act are most general. It creates the summary jurisdiction in all cases of breach of trust, or supposed breach of trust, and in all cases where the order or direction of the Court shall be deemed necessary for the administration of any trust for charitable purposes; but the decisions I think have settled that it does not apply between the trustees and strangers, that it applies only between the trustees and the objects of the trust; and that it is in the discretion of the Court to what extent it ought as between them to be applied. The cases do not I think enable any fixed rule to be laid down, by which the Court can be governed in the exercise of that discretion. Lord *Cottenham*, in the *Tiverton School case* (a), is reported to have said, that the Act ought not to be applied in cases where the Court sees that the jurisdiction given by it cannot be exercised with justice to any parties, or with benefit to the charity; and it appears that he considered that case not to be proper for the exercise of the jurisdiction, as it involved extensive and fundamental questions as to the principles on which the charity was to be administered (b). But these rules still leave it to be considered by the Court, in each case, whether the Act can be applied with justice and benefit; and what are the extensive and fundamental questions of principle which ought to exclude its application. Perhaps the rule might well be laid down, that the Act, at all events, may safely be resorted to in all cases where the objects of the charity have no distinct interests, and where, therefore, the Attorney-General properly represents them all; and in all cases where, although there may be distinct interests, no substantial question of principle can arise between the se-

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(a) *Attorney-General v. Earl of Devon*, 15 Sim. 193. See p. 259.

(b) *Id.* p. 262.

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veral objects. This, however, is not the question in the present case. I cannot accede to the argument, that, because a scheme was settled by the decree of the Commissioners, followed by the order of the Lord Chancellor, it was not in the power of the Court to alter it; and if it could be altered upon information, I think it could be altered upon petition. Under the Act, the Court had a discretion whether it would interfere upon petition or not. It has exercised that discretion; and I do not think that I could be justified in disregarding what has been done by the Court in the exercise of a jurisdiction given to it by the statute, although it was discretionary in the Court whether it would exercise that jurisdiction or not.

As to the third ground, upon the question, whether this is a grammar school, I think no reasonable doubt can be entertained. It was held by Lord *Langdale*, in *The Attorney-General v. Jackson (a)*, that the words "free school," in the instrument then under his consideration, ought not to be construed "free grammar school." And I think the words "free school" are flexible in their meaning, and must be construed according to the context and the usage which has prevailed in the school. The term "free school" has no reference to the instruction given in the school, but refers to the terms on which the instruction is given; and if grammar be taught in a school free of charge, I think it may well be said to be a free school. This school appears by the inquisition to have been founded "for the instruction of children and youth in good literature and learning;" terms which, having regard to the early period of the foundation, go far of themselves to shew that it was intended for instruction in the learned languages. In the early documents of 1687 and 1696, relating to the masters of the school, documents in which a true description of the

The term "free school" is flexible in its meaning, and must be construed according to the context and usage. It has no reference to the instruction given, but to the terms on which it is given.

character of the school was most likely to be found, it is called the Free Grammar School. It is uniformly so described in all the proceedings of the trustees from 1701, and in all the leases from 1704; and it appears that, in 1756, the trustees not only described the original institution of the school to have been for teaching Latin and Greek, and required payment to be made for instruction in writing and arithmetic, but required the under master to enter into a bond conditioned for giving such instruction, a fact which appears to me to be of the utmost importance for determining the character of the school; for of course if it had been the duty of the under master to give such instruction, no such bond could have been required. On the other hand, I see no evidence to prove that the school was not a grammar school, except the equivocal description of it as a free school in the inquisition and in the early leases, and what is said by the witnesses in their depositions, which is of less weight, as they admit some payments to have been made. And upon the balance of this evidence, I have no hesitation in concluding, that this school was a grammar school, and, therefore, within the jurisdiction of the Court under Sir *Eardley Wilmot's* Act; and although I apprehend that the Court has the same discretion as to applying that Act as it has exercised as to Sir *Samuel Romilly's* Act, I think that, the Act having been applied, what has been done under it cannot be disregarded.

It was said, however, on the part of the defendants, that if the Court should be of opinion, that the proceedings upon the petitions were within the jurisdiction, the case must be considered as concluded: that the orders upon the petitions must then have the same effect as decrees of the Court, and could be altered only by bill of review for error apparent, or upon the discovery of new facts; that it was not competent to the Attorney-General to undo his

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The foundation of a school in or before the 17th century, for the instruction of children and youth in good literature and learning, goes far to shew that it was intended for instruction in the learned languages.

Evidence on which the Court concluded that a school was a grammar school within the jurisdiction of the Court under Sir *Eardley Wilmot's* Act.

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own proceedings; and the case of *Hyde v. Edwards* (a) was cited, as to the effect of proceedings under Acts of Parliament creating summary jurisdictions. I most fully agree to that decision, and concur in the general position advanced in the argument on the part of the Defendants, as to the effect of proceedings under such Acts of Parliament. Where a summary jurisdiction is created by Parliament, the intent of the legislature must surely be, that the proceedings under it, when resorted to, should have the same force and effect as the proceedings under the ordinary jurisdiction, for which it is substituted; but this Court has not, in cases of charity, acted on the strict principles by which it is governed in ordinary cases; and I am not prepared to hold that it is not competent to the Attorney-General in a charity case to call upon the Court to review a scheme which has been settled under its decree, if he is satisfied that the scheme does not operate beneficially for the charity, and thinks that he can satisfy the Court, that the interests of the charity can be better promoted by an altered scheme, consistent with the foundation, the usage, and the law. In such a case, I think that it is not only competent to the Attorney-General, but it is his duty, to apply to the Court for an alteration in the scheme. The Court, as I have already had occasion to observe, constantly alters schemes which have been settled under its decree, as the changes of times and circumstances may require; and I see no reason why it may not equally alter them under such circumstances as I have pointed out. Lord *Cottenham*, in the *Attorney-General v. Bovill*, differing from Lord *Langdale* upon the point, held, that he was not precluded by a decree of Sir *William Grant* from doing what might be proper to be done for the due regulation of the charity; and I think that, in principle, that case governs the present upon the point now under consideration. The

(a) 1 Mac. & G. 410; S. C., 1 Hall & T. 552.



Attorney-General, it must be remembered, acts in these cases on behalf of the Crown as *parens patriæ*, and represents all the objects of the charity. The Court, in these cases, cannot look to any right or interest of the relator, but can regard the suit only as instituted by the Attorney-General, and all the objects of the charity are thus, in effect, Plaintiffs through him, a consideration which has probably, in some degree, led to the deviations from the ordinary rules of the Court which have occurred in such cases.

But, although it is thus in my opinion competent to the Attorney-General to apply to the Court for alterations in schemes which have been settled under its directions, it is obvious, I think, that the Court must proceed upon such applications with the utmost possible caution; that what has been done by the Court must not be disturbed, except upon the most substantial grounds, and upon the clearest evidence, not only that the scheme does not operate beneficially, but that it can by alteration be made to do so consistently with the object of the foundation. Incalculable mischief will ensue to all the charities in the kingdom, if this rule be not strictly observed, and if the Court ventures in such cases to interfere upon speculative views as to the result of alterations, or in matters of discretion or regulation,—matters on which the opinion of each succeeding Attorney-General and of each succeeding Judge may well be permitted to differ. I consider this case as casting upon me the duty of most carefully guarding myself against being led into adopting, in opposition to what has been already settled by the Court, any mere opinions which I may entertain as to what might be more or less beneficial for this charity.

Looking at the evidence in this case, I can entertain no doubt that more boys would resort to the school, if the scheme were altered, the scale of education reduced, and the payments for it abolished. But was not this the very

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The Attorney-General acts on behalf of the Crown as *parens patriæ*, and represents all the objects of the charity, who are thus, in effect, Plaintiffs through him.

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question which the Court had to consider when these schemes were settled? It was then a question between perfecting the education of those who were the objects of the foundation, and extending the benefit of the foundation to those who were not objects of it; and the Court has exercised its discretion upon the subject. The inhabitants of *Kidderminster* have heretofore enjoyed a limited education for their children free of charge, or, at all events, upon a very trifling payment. It has appeared, that they were not entitled to it, and they feel, and not unnaturally, disappointed at the discovery; but I cannot alter the foundation for them. I do not, indeed, see any mode by which the schemes could be altered with any certainty of benefiting them, consistently with the regard which the Court is bound to pay to the interests of the primary objects of the foundation; and I think it is the duty of the Court to be more than ordinarily cautious in a case like the present, where the scheme has been so recently settled, and popular feeling has evidently been excited against it. Regarding, as I do, most of the questions which are raised by this information, as questions on which the Court has already exercised its discretion, I should, perhaps, be justified in giving no opinion upon them; but some of them are of such great importance to all the schools of this description throughout the kingdom, that I feel bound to state the opinions which I entertain upon those questions.

As to the question of boarders, this information advances the general position that no boarders ought to be admitted into this school. That position is rested upon the ground, that the income of this charity is sufficient to provide competent masters for the instruction of the boys; and it is said, that, in such cases, boarders ought not to be admitted; and the cases of the *Tiverton* (a) and *Manchester* (b) schools

(a) *Attorney-General v. Earl of Stamford*, 16 Sim. 453; on appeal, *Devon*, 15 Sim. 193. S. C., 1 Ph. 737.

(b) *Attorney-General v. Earl of*

were cited in support of the position. I do not understand those cases to have laid down any general rule against the admission of boarders in grammar schools, nor do I find any such general rule laid down in any case. In *The Attorney-General v. The Earl of Devon*, the late Vice-Chancellor of *England* appears to have proceeded upon the terms of the endowment, and upon the opinion which he considered to have been expressed by Lord *Cottenham* in the *Manchester School case*, that the terms of the endowment of that school precluded the admission of boarders; and accordingly, when that case itself came before him on further directions, he decided that boarders ought not to be admitted into that school. Whether the late Vice-Chancellor rightly construed the endowment in the one case, or rightly collected the opinion of Lord *Cottenham* in the other, is not for me to decide, and is not indeed material to the present case; but I confess, that, after very carefully considering the *Manchester School case*, I am unable to collect from it any such opinion as was considered by the late Vice-Chancellor to have been expressed in it. That Lord *Cottenham* was adverse—most adverse—to the admission of boarders into these schools is clear from his judgment, not only in that case, but in many other cases which were referred to in argument; but neither in that case nor in any of the other cases do I find that he prohibited their admission. It is sufficient, however, for the present purpose to observe, that the cases which have been cited proceeded upon the construction of particular endowments under particular circumstances; and that we have here to consider the construction of a different endowment under different circumstances; and I cannot therefore consider them as at all governing the present case. This endowment is for the education of children and youth in *Kidderminster*, not as in the *Tiverton School case*, primarily of children born in the place. What then is there to prevent the inhabitants of *Kidderminster* from taking, as boarders, boys who

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Distinction between schools endowed for the education of children and youth in a certain town, in which the inhabitants might therefore take as boarders boys resorting to the place for their education, and schools endowed for the education of boys born in the town in which the school is situated.

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may resort to the school for their education; and if it be competent for the inhabitants to do so, why are the masters to be precluded from the same privilege? Lord *Eldon*, in the *Bingley School case* (a), referring to this subject, says (b), "In the evidence I find no contradiction to the allegation, that children boarding with inhabitants of *Bingley* have been admitted, and that obliges one to consider whether, if you destroy the right of the master to take boarders, you can leave untouched the ancient practice with respect to other persons taking boarders. I think it probable, from the evidence, that the boarders were first introduced at an early period of the mastership of Mr. *Hudson*. What is the effect of the fact of the master not having taken boarders before that time, is a question to be considered by-and-by; but if even up to this time the master had received no boarders, there would be considerable difficulty in determining that for that reason he should not hereafter have them." And although it is true that Lord *Eldon* there refers to an ancient practice as having existed in that case, the same difficulty appears to me to present itself, whether the practice has existed or not.

It is said that greater favour will be of course extended to the boarders, and that their superior condition in life must prevent association, and produce discord in the school; and that these are evils, the very danger of which ought to be avoided where the income of the charity is sufficient to maintain competent masters. It is I think a sufficient answer to the first objection, that it would be an abuse, which the trustees and the Court would be bound instantly to correct; and that supposing the admission of boarders to be of itself beneficial, it would hardly be refused upon the ground that abuses might arise from it: and to the second objection, the answer appears to me to be, that inequality

(a) 2 J. & W. 353.

(b) Id. 373.

of grade must necessarily exist in all these schools; and that, if on the one side there be evils, there are on the other side great advantages resulting from the admixture of the different classes. This is most admirably expressed by Lord *Lyndhurst* in *Attorney-General v. The Earl of Stamford*, where he says: "There is another consideration also connected with these establishments, that they are the avenues by which the humbler classes, by industry, activity, and intelligence, can force their way into the highest situations of the state; and, by furnishing the means of uniting at an early age the upper and lower classes, they tend to bind together by the strongest tie the whole system of society (a)."

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If, on the one side there may be evils, there are on the other great advantages resulting from the admixture of children of the upper and lower classes in the same school.

The observations which have been made upon the income of this charity being sufficient to maintain competent masters, do not in my opinion present this case in its true point of view. All the cases establish that it is the duty of the Court to consult to the utmost the interests of the free scholars, the primary object of the founder's bounty; and the question therefore, as I view it, is, not whether competent masters can be provided for a given income, but by what means the services of superior masters can be secured. It cannot I think be doubted, that the admission of boarders into the school tends to accomplish this end; and when it is asked that boarders may be excluded from it, it must be borne in mind that the probable if not the necessary consequence will be, to lower the standard of the masters.

The question is not whether a competent master of a grammar school can be provided for a given income, but by what means the services of a superior master can be secured; and there is no rule that the Court will exclude boarders in all cases where the income of the charity is sufficient for the maintenance of the master.

I must add upon this part of the case, that there appears to have been some practice in this school of taking boarders, although to a limited extent only, and abandoned of late years in consequence of the advanced ages of the mas-

(a) 1 Ph. 761.

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ters; and whatever my opinion as to boarders might have been, I could not consistently with the authorities have excluded them during the incumbency of Mr. *Cockin*. I must add also, that it is the duty of the trustees to take care that the number of boarders admitted be not such as in any manner to affect the admission of free boys, or the means of educating them to the best advantage, according to the provisions of the scheme.

I have thought it right to enter more fully into this question as to boarders, because I find, on referring to Mr. *Carlisle's* work on endowed schools, that there is scarcely one of these grammar schools in which boarders are not received; and I am fearful that great mischief would ensue if any countenance were given to the notion, that this Court would exclude them in all cases where the income of the charity was sufficient for the maintenance of the masters. Such a determination would I think lead to endless questions, which could only be determined by this Court, as to what amount was to be considered sufficient for the masters' maintenance. No rule laid down for one school could with any justice be applied to another; and it would be necessary to consider in each case the position and character of the school.

As to the question raised by the information in regard to the payments charged upon the free scholars, I am of opinion that the information ought, as to this also, in any view of the case, to be dismissed. There are many branches of education provided by this scheme which do not fall within the ordinary range of the instruction which the masters of grammar schools are bound to give; and the income of the charity does not, in my opinion, afford an adequate remuneration for such extended instruction. The number of boarders could not of course be relied on as a provision for this instruction, and I do not see how it could be se-

cured otherwise than by these payments. The question, therefore, appears to me to have been reduced to this, whether it was desirable that this instruction should be secured; and I am of opinion that it was: for, it being necessary to keep up the grammar school, and to maintain the superior education afforded by it, I think it could not be otherwise than desirable that that education should be made complete. As to the minor points, respecting the ages and number of the boys, I regard them so entirely as matter of discretion, involving no general principle, that I do not think it necessary to enter into them; and the facts do not raise the question as to the prizes.

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There is, however, one question in this case which I feel bound to entertain, regarding it as a question not of discretion, but of principle; I mean the question as to the religious qualification of the boys required by this scheme, and as to the other provisions having reference to religious instruction. There is, I think, some reason to suspect that this school was in connection with the Church of *England*, but the evidence shews that the usage has been to admit the children of dissenters; and in the absence of any positive evidence confining the benefit of the charity to members of the Church of *England*, I think the question must be governed by usage, and that the Attorney-General is therefore entitled to have this restriction removed. I think also that this scheme, having been finally settled in 1848, after the decision in the *Warwick School case* (a), ought not to have contained the other provisions as to religious instruction which are inserted in it. The course pursued in the *Warwick School case* is, in my judgment, by far the best to be adopted where dissenters are admitted to these schools, as it tends to prevent those feelings of offence which are too apt to arise on such a subject. I

(a) *In re King's Grammar School in the Borough of Warwick*, 1 Ph. 564.

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shall, therefore, direct this scheme to be reformed according to the precedent of the *Warwick School case*.

The remaining question raised by this information is, as to the exchange; and upon this point I feel no difficulty. It is not alleged that there was any fraud or concealment in the transaction, or that all the requisites of the Act were not duly observed; but it is said that the exchange was for the convenience of the master, and that it was not beneficial to the charity, except upon the footing of boarders being maintained. Those are questions with which, in my opinion, this Court has nothing to do. It was part of the duty of the Commissioners appointed under the Act, to ascertain whether the exchange was for the permanent benefit of the charity, and it was the duty of the bishop to review their determination. The Commissioners and the bishop have determined it to be beneficial, and I am aware of no power which this Court has to reverse their decision. It was said, that the bishop was himself a trustee; but it is not alleged that he had any personal interest in the matter, or that he in any manner misconducted himself. To hold that the exchange could be affected upon such a ground, would be to render the Act inoperative in all cases where the bishop happens to be a trustee of the charity; and this clearly could not be the intention of the Legislature, as the Act contains express provisions applicable to the case where the party who takes in exchange happens to be a trustee.

The decree therefore which I shall make, will be to alter the scheme as to matters of religious qualification and instruction, in the mode which I have pointed out, and to dismiss the rest of the information. So far as I dismiss it, I shall dismiss it with costs; as, although no just complaint can be made of the pleadings in the cause, I most highly disapprove of charity informations got up by public meet-

The Court dis-  
 approves of  
 charity inform-



ings and supported by public subscription. And I think there is just reason to complain of the enormous mass of evidence by which this information has been attempted to be supported, and of the character of some parts of that evidence—I allude particularly to the evidence of the surveyors. So far as I give relief upon this information, I shall give it without costs, being fully satisfied, from the conduct of one of these relators, that the matter on which the relief is given was not the substantial ground on which this information was filed. I find that one of the relators himself objected before the bishop to the children of dissenters having been admitted to the school. The trustees will take their extra costs out of the fund.

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WORCESTER.  
Judgment.  
ations got up  
by public meet-  
ings and sup-  
ported by pub-  
lic subscrip-  
tions.

DARBY v. BAINES.

THE Plaintiffs, the registered owners of 56-64ths, and the Defendant, the registered owner of 8-64ths of the barque *Deborah*, made and signed the following agreement:—

“ *Liverpool*, 19th Nov. 1849.

“ It is agreed by the owners of the barque *Deborah*, that the ship shall be managed by Messrs. *Darby & Sim*, who shall receive a commission of 2½ per cent. on all disbursements, and that to *James Baines* the usual brokerage on any charter he may procure for her; but in case it shall be deemed advisable not to charter the ship on her homeward voyage, then he shall only receive a commission of 1½ per cent. for collecting freight &c., and no other brokerage: and it is agreed, that *Thomas Robinson*, Esq., and

Nov. 7th &  
10th.

No question arises as to the jurisdiction of this Court in enforcing the rights of some against the other part owners of a ship, with regard to the management of the ship and the possession of the certificate of registry, where those rights are regulated by an agreement entered into between all the owners of the ship.

Powers and duties of the managing owners of a ship as between themselves and the other part owners.

Construction of an agreement entered into by the part owners of a ship, with regard to the management of the ship and the allowances for brokerage and commission.

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*William Roberts, Esq.*, shall be appointed auditors to examine the accounts. The insurance on the ship to be effected by Messrs. *Darby & Sim* for all the owners. Ship to be valued at 3500*l*."

The bill complained, that, on the arrival of the barque in *London*, in August, 1850, the Defendant's clerk went on board, and untruly stated to *Liston*, the master, that he had received a letter from the Plaintiffs *Darby & Sim*, requesting him to have the ship reported by certain brokers whom he named; and by such statement of his clerk the Defendant obtained from the master possession of the ship's certificate of registry, which he still held; that the Defendant had given notice to the parties from whom the freight was due, not to part with it; that he had also affected to enter into a contract for chartering the vessel for a future voyage; that the Plaintiffs *Darby & Sim*, under their powers of management, had chartered the vessel for a voyage to *South Australia*, but which charter the Defendant had written to the charterers to repudiate. The bill alleged, that the vessel could not clear out at the Custom House or proceed on her voyage without the production of the certificate of registry; and the bill prayed, that the Defendant might be restrained by injunction from preventing the Plaintiffs *Darby & Sim* from receiving, or interfering with them in receiving, the freight due, and from preventing or interfering with the sailing of the ship in fulfilment of the charter-party made by *Darby & Sim* for the voyage to *South Australia*, either by withholding the certificate of registry or otherwise; and that he might be likewise restrained from in any manner preventing the Plaintiffs *Darby & Sim* from having the management of the ship under the agreement; and that, if necessary, a receiver and manager might be appointed.

The Defendant by his affidavit denied that he had given

any instructions to his clerk to make an untrue statement to the master; and he and his clerk denied that such untrue statement had been made. The Defendant asserted, that, under the contract, he was entitled to his commission for chartering the barque; and that he had actually entered into a beneficial charter-party for a future voyage, and therefore he refused to deliver up the certificate of registry. He stated, that he had withdrawn the notice to retain the freight; and he also stated, that the Plaintiffs had entered into the charter-party for the voyage to *Australia* after they had notice of the charter-party which the Defendant had effected; and that the charter-party, for which the Plaintiffs had contracted, was not beneficial to the owners. He alleged, that the object of the Plaintiffs was to obtain the exclusive chartering of the barque, and to compel him to sell his share at an undervalue.

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Mr. Bacon and Mr. W. M. James for the Plaintiff.

Argument.

Mr. Rolt and Mr. Dickinson for the Defendant.—First, this is a case of a dispute between the owners of a ship, in which the proper jurisdiction is in the Admiralty Court, and not in equity.

Secondly.—According to the terms of the agreement, the Defendant is entitled to charter the ship, and to receive the usual brokerage on such charter; and this right the Plaintiffs are not entitled to take from him. The affidavits shew, that the Defendant has actually entered into a charter-party; and he has thereby entitled himself to the benefit which the agreement, in such a case, gives him. The Court will not therefore aid the Plaintiffs in an attempt to defeat the contract.

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 —  
*Judgment.*

VICE-CHANCELLOR:—

The question whether the injunction should be granted or not, mainly depends upon the construction of the agreement; and I am of opinion, that, upon the true construction of the agreement, the right to charter the barque belongs to Messrs. *Darby & Sim*.

The first clause of the agreement runs thus:—"It is agreed by the owners of the barque *Deborah*, that the ship shall be managed by Messrs. *Darby & Sim*, who shall receive a commission of 2½ per cent. on all disbursements." And I take the effect of this clause to be to place Messrs. *Darby & Sim* in the position of managing owners, or, in other words, of ship's husbands; and the powers and duties of ship's husbands are thus stated in Abbott on Shipping: "He is to see that the ship is properly repaired, equipped, and manned; to procure freights or charter-parties; to preserve the ship's papers; to make the necessary entries; adjust freight and averages; disburse and receive monies; and keep and make up the accounts as between all parties interested. His acts for these purposes are to be considered to be the acts of all the part-owners, who are liable on all contracts entered into by him for the conduct of their common concern—the employment of the ship (a)." The Defendant therefore must, I think, be considered to have given all these powers to *Darby & Sim* by the first clause of the agreement. Is then the power of chartering thus given to them taken away from them, and given to the Defendant, by the subsequent clauses of the agreement? I am of opinion that it is not. The next clause merely provides, that the Defendant shall have the usual brokerage in any charter he may procure for the ship. There is a marked distinction between the absolute language in the first clause "shall be managed," and the contingent expres-

(a) Abbott on Shipping, p. 106, 7th edit.

sion in the second clause "may procure." If the intention had been that the Defendant should have the unqualified right to charter, why was not the language in the second clause as absolute as in the first? I am much disposed to think, that the second clause had reference to some doubt which was entertained, whether the Defendant, being part-owner, could charge brokerage on any charter he might procure, and was inserted for the purpose of securing to him the right to do so; but whether this was so or not, I think, that, at all events, this clause could not take away the right given by the preceding one.

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It was said, however, that whatever might be the effect of the second clause, the last clause clearly gave the right to the Defendant; but I think that it does not, and, on the contrary, that it confirms the construction contended for by the Plaintiffs. The terms of the clause are, "but in case it shall be deemed advisable not to charter the ship on her homeward voyage, then he shall only receive a commission of 1*l*. per cent. for collecting freight, &c., and no other brokerage;" and I think the true meaning of the clause is, that, in case any charter which the Defendant might procure should not extend to the homeward voyage, he should only receive the 1*l*. per cent. commission. I think this must be the true meaning of the clause, because the introductory words import a qualification of the previous clause providing for the allowance of the usual brokerage; and the words "no other brokerage," at the end, seem to confine the allowance to be made to the commission only; and I think this clause confirms the construction contended for by the Plaintiffs, for the words "in case it shall be deemed advisable" cannot be construed to mean in case the Defendant shall deem it advisable, but must be taken to refer to the judgment of the parties to whom the power of management was given. This

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—  
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being my construction of the agreement, I am of opinion that the order for the injunction and manager must be granted; and I grant it the more readily, because, without reference to the question, whether the certificate was obtained by false representation or not, I think the Defendant cannot be entitled to use it in contravention of the agreement.

It being the province of this Court to deal with the agreement of the parties, there is no difficulty about the jurisdiction.

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LIBERTY was given to all parties to propose themselves as receiver and manager.

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Nov. 5th.

BROMITT v. MOOR.

A party to a suit in which a decree of foreclosure has been made, in the absence of another party interested in the estate, whose interest was not disclosed on the pleadings, is, notwithstanding the imperfection of the suit, bound by the decree of foreclosure.

**A** CLAIM for redemption.—It stated that, under an indenture of the 17th of June, 1824, made between *Dorothy Bromitt* of the one part, and *John England* and *Thomas Daltry* of the other part, and under the will of *Dorothy Bromitt*, dated the 7th of November, 1833, the Plaintiff *William Bromitt* was entitled to the equity of redemption of the freehold property comprised in the said indenture, which was originally mortgaged for securing 500*l.* and interest; and that the Defendant *Ann Moor* was entitled to the principal money and interest (if any) remaining due upon the mortgage.

A party to a foreclosure suit, whose interest is thereby foreclosed, and who afterwards becomes entitled to an interest in the same estate by devise or otherwise, from another person who was not a party to the foreclosure, may bring his bill of redemption.

Relief will not be given in such a case, on a claim for redemption, stating only that the Plaintiff is entitled to the equity of redemption under certain instruments, but not stating any of the proceedings in the suit for foreclosure, or the grounds on which the Plaintiff seeks to set it aside.

The Defendant met the claim by an affidavit, which stated that, in the year 1842, *William Moor* (under whom the Defendant was devisee,) filed his bill of foreclosure against the Plaintiff *William Bromitt*, as the heir-at-law of his mother *Dorothy Bromitt*, the mortgagor, who was by the bill alleged to have died intestate; that he put in his answer; that the usual decree for account and foreclosure in default of payment was made in March, 1844; and that, the sum found due to *Moor* not having been paid, the order for foreclosure was made absolute on the 11th of February, 1846. The Defendant also put in evidence the answer of the Plaintiff *William Bromitt* in the foreclosure suit. By his answer, the Plaintiff denied that *Dorothy Bromitt* had died intestate, and admitted possession of the probate copy of her will. He also admitted that he (*William*) was the heir-at-law of *Dorothy*.

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—  
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In reply to the Defendant's affidavit, the Plaintiff filed a further affidavit, which stated that *Dorothy Bromitt*, the mortgagor, died in 1836, having by her will devised all her lands to her sons, the Plaintiff and *George Bromitt*; that *George Bromitt* died in October, 1850, having by his will devised all his interest in the property in question to the Plaintiff.

The will of *Dorothy Bromitt* was in the following words:—"First, I give and bequeath to my son *William Bromitt* and my son *George Bromitt*, and likewise constitute and ordain them my sole executors of this my last will and testament, all and singular my lands, messuages, and tenements, with all my goods and chattels, by them freely to be possessed and enjoyed; and I also hereby ordain and appoint my above executors to pay to my son *John Watson Bromitt*, twelve months after my decease, 20*l*."

The Defendant rejoined by another affidavit, to the

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effect, that the devise of the mortgaged property by *Dorothy Bromitt* was not known to the mortgagee at the time of the foreclosure suit.

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Argument.  
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Mr. Selwyn for the Plaintiff.

First.—The Plaintiff was a party to the suit of 1842, in the character of heir-at-law of the mortgagor; and, although his interest was as devisee and not as heir-at-law, it must be admitted, that, whatever estate or interest he then had, it was foreclosed. The estate of *George Bromitt*, who was then living, and was not a party, was untouched by the decree; that estate has since been devised by *George* to the Plaintiff; and the Plaintiff is not less entitled to the benefit of such devise than any other person, an entire stranger to the proceedings in the foreclosure suit, would have been.

Secondly.—The question then is, what interest the Plaintiff and *George Bromitt* took under the devise contained in the will of *Dorothy* the mother. The words of the devise are sufficient to pass the fee: *Doe v. Haslewood*(a); and the Plaintiff, taking the interest of *George* and offering to pay the entire mortgage debt and interest, is entitled to redeem the whole estate.

Thirdly.—But if the Court should hold that the devise gave the sons a life estate only, still the decree of foreclosure was irregular, as the suit was defective in parties, *George* not being a Defendant; and the Plaintiff is entitled to redeem, notwithstanding what was done in that suit: *Cook v. Sadler* (b).

(a) 6 A. & E. 167.

(b) 2 Vern. 235.



The VICE-CHANCELLOR desired the counsel for the Defendant to confine their argument to the point on the construction of the will.

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The *Solicitor-General* and Mr. *Glasse*, for the Defendant, cited *Goodright v. Barron* (a) and *Doe v. Baines* (b), cases in which words nearly similar to the present had been held to be insufficient to pass the fee.

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The VICE-CHANCELLOR said, that the plaintiff had not thought proper to state on his claim any of the facts of the case with regard to the foreclosure suit, or the grounds on which he sought to treat that suit as ineffectual, but had brought forward his case as if it were a simple claim for redemption, to which no impediment existed. Upon that ground alone the claim would have been dismissed. He would, however, dispose of the present case, not on the insufficiency of the pleadings, but on the merits. Supposing that the will of *Dorothy* did not pass the absolute interest in the fee of a moiety of the mortgaged estate to *George*, the Plaintiff and *George* had, at the time of the foreclosure, a joint interest for life in the undivided moieties of the estate, with the fee in the Plaintiff; in this state of their interests, the Plaintiff was made a party to the bill of foreclosure, and, in that suit, he raised no objection on the ground that *George* was not a party, and he allowed a decree to be made against him. In this view of the case, the claim now made was an attempt to set up an objection for want of parties in the former suit, which, if valid, (and he did not say it was not valid), ought to have been taken in the foreclosure suit before the decree was obtained. The Plaintiff could not now avail himself of such an imperfection to avoid the effect of the foreclosure. The only ques-

Judgment.  
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(a) 11 East, 220.

(b) 2 C. M. & R. 23; S. C., 5 Tyr. 655.

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*Judgment.*

The words, "I bequeath to my sons, A. and B., and likewise constitute and ordain them my sole executors of this my will, all and singular my lands, messuages and tenements, with all my goods and chattels, by them freely to be possessed and enjoyed," *held*, not to be a devise in fee.

tion then on the merits was, whether any interest in the estate became vested in the Plaintiff upon the death of *George*. The construction of the will must be governed by the cases of *Goodright v. Barron* and *Doe v. Baines*, unless those cases have been overruled by *Doe v. Haslewood*. But the latter case was determined upon the effect of the peculiar expression by which the testator appointed the person named in the will to be sole executrix of his freehold house, which the Court thought could only be satisfied by holding that the fee passed. By the gift in the present will of the "lands, messuages, and tenements," nothing more than the life estate passed. The direction to the executors to pay 20*l.* to *John Watson Bromitt* did not affect the disposition of the real estate.

Claim dismissed, with costs.

Nov. 14*th*.

## GOODE v. WEST.

The Court will not give relief on a claim where the material facts of the case, being in the Plaintiff's knowledge, are not stated upon the claim, and the case stated upon the claim is not the case upon which the Court is to adjudicate.

A trustee paying into Court a sum of money under

the Trustee Relief Act, (10 & 11 Vict. c. 96), although such sum may be less than the amount of the trust fund in his hands, is discharged as to the money so paid in; and after such payment the parties beneficially interested can proceed only under the Act to recover the money so paid in; and the ordinary jurisdiction of the Court, as against the trustee, is confined to the balance which may remain due from the trustee in respect of the trust fund after such payment.

A CLAIM stating certain deeds of settlement and appointment, under which the Plaintiff and other persons therein named became entitled, upon the death of the tenant for life, in January, 1850, to a sum of 1777*l.* 13*s.* 11*d.* invested on mortgage by the Defendants, the trustees, and which the Defendants had recently called in and received, and claiming to have the said sum and interest applied and divided between the Plaintiff and the other persons beneficially entitled thereto, and the Plaintiff's costs of the suit, and all proper directions given and accounts taken for that purpose.

The affidavits in support of the claim stated a correspondence between the solicitors of the parties, on the subject of a release of the trustees, and the custody of the deed of appointment. The Plaintiff also exhibited an office copy of an affidavit, made by the Defendants on paying into Court 444*l.* 8*s.* 5*d.*, being the one-fourth part of the trust fund appointed to the Plaintiff, 17*l.* 12*s.* 2*d.* interest thereon, which accrued after the death of the tenant for life, and 13*l.* 9*s.* 2*d.* interest accruing in the lifetime of the tenant for life, claimed both by her executors and by the Plaintiff, deducting from the first sum 25*l.* claimed to be due to the trustees for their costs as against the Plaintiff. The trustees, by this affidavit, stated, that they were advised and believed they could not, as trustees, safely pay such trust monies to the Plaintiff, without having the deed of appointment delivered up to them as their authority and justification for such payment, or having at least a covenant by the Plaintiff to produce such deed at his own expense; and that the said *Thomas Goode* had refused either to give up the said last-mentioned deed or to enter into such covenant.

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The Defendants, by their affidavit, stated, that they had paid the sums into Court under the statute 10 & 11 Vict. c. 96 (a), for the reasons stated in their said affidavit.

The *Solicitor-General* and Mr. *Younge* for the Plaintiff.— The trustees have not paid into Court the trust fund; they have taken upon themselves to deduct arbitrarily a sum of 25*l.*, for which no satisfactory explanation can be given; for it is an unreasonable demand for the mere costs of preparing a release, even if the Defendants ought not to have been satisfied with a simple receipt: *Chadwick v. Heat-*

Argument.

(a) The Trustee Relief Act.

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Argument.

*ley* (a). The Plaintiff cannot apply by petition, under the Trustee Relief Act, for the sum so improperly deducted: *In the Matter of Bloye's Trust* (b); and, therefore, he is entitled to treat the payment into Court as not justified, and to sue for the entire fund. If this be not so, any trustee may deduct a sum under 10*l.* from the monies which he shall pay into Court; and as to such deduction the *cestui que trust* will be without remedy.

Mr. *Baily* and Mr. *Simpson* relied upon the statute as the defence of the trustees with reference to the whole subject of the claim, except the 25*l.*; and as to the 25*l.*, they submitted; that the case was not raised, and could not be determined upon the claim. The Court would only proceed *secundum allegata et probata*: *Johns v. Mason* (c), *Eccles v. Cheyne* (d). The Plaintiff might have applied under the Solicitors' Act (e) for the taxation of the costs deducted.

The *Solicitor-General* in reply.—The Plaintiff is at least entitled, under the claim, to an account of what is due to him; and if the payment into Court can be treated as a discharge, the Plaintiff will recover only the balance.

Judgment.

The VICE-CHANCELLOR said, that in the case of *Bromitt v. Moor* (f), he had had occasion to decide that parties resorting to the jurisdiction of the Court in this form, are bound to state in the claim the material facts which are in their own knowledge; and that they are not justified in bringing their case forward upon a statement which does not represent the facts as they really stand. The Plaintiff in this case knew that his share of the fund was severed

(a) 2 Coll. 137.

(b) 1 Mac. &amp; G. 488.

(c) *Supra*, p. 29.(d) *Id.* 215.

(e) 6 &amp; 7 Vict. c. 73.

(f) *Supra*, p. 374.

from the other three-fourths, and that his one-fourth share, after deducting the 25*l.*, had been paid into Court under the Trustee Relief Act. Of these facts the claim took no notice, but, on the contrary, called upon the Court to administer the whole fund, as if it were still unsevered and in the hands of the trustees. He entertained a strong opinion, that Plaintiffs by their claims should state the actual facts upon which their cases are founded; and he said, that, until corrected by higher authority, he should not give the Plaintiff relief in that form, where the case stated upon the claim is not the case on which the Court is to adjudicate; and in such a case he should dismiss the claim, whatever course he might take to preserve the rights of the parties. With regard to the Plaintiff's title to a decree for payment of his fourth share of the trust fund, the jurisdiction of the Court either by bill or claim against the trustees was, he had no doubt, gone as to the sum paid into Court. The words of the Act were conclusive: the receipt of one of the cashiers of the Bank for the money so paid "shall be a sufficient discharge to such trustees, or other persons, for the money so paid" (a). The Act has left the party beneficially interested to pursue his remedy (as to the money so paid in) under that Act, and not according to the ordinary jurisdiction of the Court. The trustees being discharged as to the monies paid in, the Plaintiff could recover no more than the 25*l.* in dispute; and as to that sum, this claim, for the reasons which he had stated, the Court would not entertain.

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Claim dismissed with costs, without prejudice to any other proceeding in respect of the 25*l.*

(a) 10 & 11 Vict. c. 96, s. 1.

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A marriage settlement declared the trusts of a sum of stock to be, that, during the joint lives of the husband and wife, the dividends should be paid to the wife for her separate use; and if she should die in the husband's lifetime, the principal sum should be transferred to him absolutely; and if the husband should die in the wife's lifetime, then the same should be held in trust for such person as the wife should by will appoint. The wife survived the husband:—*Held*, that the wife took, by implication, a life-interest in the trust-fund.

## ALLIN v. CRAWSHAY.

UPON the marriage of *W. Crawford* and *Clara* his wife, *Richard Crawshay* settled the sum of 1900*l.* 3½ per cent. Annuities, standing in the names of trustees, upon trust, during the joint lives of the husband and wife, to pay the dividends to the wife for her separate use; and if the wife should die in the lifetime of the husband, to transfer the principal sum to the husband absolutely; but if the husband should die in the lifetime of the wife, then to transfer the same to such person or persons, and upon and for such trusts, intents, and purposes, and subject to such powers, provisoes, conditions, and agreements as the wife should by her last will direct or appoint; and in default of such appointment, to stand possessed of the same in trust for the person or persons who, at the time of her decease, would have been entitled to her personal property under the statutes for the distribution of the personal estates of persons dying intestate, in case she had died intestate, and without having been married. The husband died in 1840, leaving *Clara* his widow surviving. The widow afterwards took the benefit of the Insolvent Act, and her assignees filed their claim against the trustees of the 1900*l.* stock, for payment of the dividends during her life.

*Argument.*

*Mr. Renshaw*, for the Plaintiffs, contended, that a life-interest in the wife would be implied.

*Mr. Bacon* and *Mr. Rogers* appeared for the trustees, (two of whom were admitted to be personal representatives of *William Crawshay* the settlor, although not upon the record in that character), and submitted the question to the Court.

The VICE-CHANCELLOR referred to the case of *Tunstall v. Trappes* (*Margaret Tunstall's case*) (a), in which a marriage settlement omitted to make any provision as to the interest of the trust-fund during the life of the wife in the event of her surviving the husband; and observed, that, subject to any thing which might be said by the representatives of the settlor, he was of opinion that the settlor did not intend to reserve to himself any portion of the fund; and that the wife took a life estate by implication. He thought, however, that where the estate of the claimant before the Court was raised only by implication, the Court should not decide the question in the absence of the personal representatives of the settlor.

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The executors of the settlor afterwards appeared and declined to argue the question further; and the Court declared that the wife was entitled to a life-interest in the fund, and directed it to be brought into Court, and the dividends paid to the Plaintiffs.

(a) 3 Sim. 312.

1851

Nov. 20th.

## CROSSLEY v. CROWTHER.

**I**N May, 1841, *Collins* deposited with *Crossley* the title deeds of a house, and, at the same time, executed a bond to him, to secure 700*l.* and interest. *Collins* died in April, 1844, having appointed his wife *Alice*, and *Crowther*, his executrix and executor, and devised the house to *Crowther* upon certain trusts, but without power of sale or mortgage. In October, 1850, *Crossley* applied to *Crowther* for the payment of the 700*l.* and interest; and, in order to supply the pressing need which *Crossley* then represented that he had for the money, there being no funds of the estate of *Collins*, and no property but that which was comprised in the security, *Crowther* applied to his solicitor, Mr. *Leadbeatter*, who procured *Parker* to advance the 700*l.* upon the bond of *Crossley*, *Crowther*, and *Alice* the widow of *Collins*; it being agreed (as the affidavit of *Leadbeatter* stated), that *Crossley's* security should not be transferred or discharged, but that proceedings should be taken thereupon to enable *Collins's* representatives to raise the money or effect a legal mortgage. *Leadbeatter* then caused a claim to be filed in the name of *Crossley* against *Crowther* and *Alice* the widow, and the parties interested under the will of *Collins*, for a foreclosure or sale of the mortgaged premises.

*Crossley* now moved that the claim might be dismissed, with costs, to be paid by the Plaintiff; and that the costs of the Defendants who had entered an appearance, as between solicitor and client, might be paid by *Leadbeatter*, the solicitor, within such time as the Plaintiff would otherwise, in obedience to the order on the motion, be bound to

*A.*, who was an equitable mortgagee by deposit of deeds of property belonging to the estate of *B.*, was paid off by *C.*, on an agreement with the executors of *B.*, (as their solicitor stated), that proceedings should be taken in *A.'s* name to enforce the mortgage security, and thereby to effect a sale of the whole or part of the mortgaged property; and the solicitor of the executors filed a claim for foreclosure in the name of *A.* against the representatives of *B.* *A.* denied that he had given authority to file the claim in his name, and moved that it might be taken off the file:—*Held*, that there being only assertion against assertion, and the solicitor alone stating that the instructions were given in the presence of *A.*,—the case was to be governed by *Allen v. Bone*, and the claim was dismissed, with costs, to be paid by the solicitor.

That, in such a case, the Court could not adjudicate between the solicitor, by whom the claim was filed, and the Defendants, the representatives of *B.*, by whom the instructions were given to file the claim in *A.'s* name; and the Court left the solicitor to any legal remedy he might have against such parties.



pay the same; and in case *Leadbeatter* should neglect to pay such costs, pursuant to the order to be made on the motion, and the Plaintiff should pay the same to the Defendants, then that *Leadbeatter* might repay the Plaintiff such costs, and that *Leadbeatter* might pay to the Plaintiff and the Defendants the costs of the application.

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The motion was supported by an affidavit of the Plaintiff, that the claim was filed without his knowledge or consent, and without any authority from him; and that he had never directly or indirectly adopted or acquiesced in the proceeding. This affidavit was met by the affidavits of *Leadbeatter* and *Crowther*, to the effect that the money was paid to *Crossley*, and the bond to *Parker* executed, in October, 1850, by the representatives of *Collins*, upon the express agreement between *Crossley* and *Crowther*, that proceedings should be taken in the name of *Crossley* upon the bond and deposit by *Collins*, to enable *Crowther* to sell the house, or execute a proper mortgage thereof to *Parker*; and that instructions to file the claim were given by *Crowther* in November, 1850, with the full concurrence, knowledge, and authority of *Crossley*. The affidavit of *Leadbeatter*, moreover, stated, that the instructions were given to him in the presence of *Crossley*. The affidavit of *Crowther* stated, that his object in the proceedings was to save expense, as far as possible, to the estate of *Collins*; and that it was understood that *Crossley* should not be personally liable for costs, but that the costs should be charged upon the property.

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Mr. *Prendergast*, for the motion, cited *Allen v. Bone* (a).

Argument.

Mr. *Bagshawe* contra.

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(a) 4 Beav. 403.

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—  
Judgment.

The VICE-CHANCELLOR said that he could not put the case more favourably for *Leadbeatter*, than to regard *Crossley* as a trustee of the equitable mortgage for *Parker*, after the advance of the 700*l.* by *Parker*; and that *Leadbeatter* had the authority of *Parker* for the proceeding (which did not, however, appear). But it could not be said that a solicitor might, on the authority of a cestui que trust, institute proceedings in the name of the trustee, without the concurrence of that trustee. The affidavit of *Crowther* stated, that he had given the instructions for the claim, after the transaction had taken place by which the rights of the parties had been altered, with the knowledge, concurrence, and authority of *Crossley*; but that affidavit did not corroborate the statement of *Leadbeatter*, that those instructions were given in the presence of *Crossley*. If the allegation, that the instructions were given in the presence and with the consent of *Crossley*, had been supported by other witnesses, a different view of the case might have been taken; but as the case stood, there was only the affidavit of *Leadbeatter*, contradicted by that of *Crossley*. The case thus fell within the principle of *Allen v. Bone*, which laid down the rule to which he should always adhere, that where there was a conflict as to the authority between the solicitor and the client, without further evidence, weight must be given to the affidavit against, rather than to the affidavit of, the solicitor.

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Order as in *Allen v. Bone*. The Court refused to adjudicate as to the question of costs as between *Leadbeatter* and *Crowther*, observing, that *Leadbeatter* would have his action against *Crowther* in respect of any liability to him which *Crowther* might have incurred.

1851.

July 26th,  
28th & 29th.

Dec. 2nd.

The reasons of the rule which protects from disclosure communications made in professional confidence, apply in cases of conflict between the client or those claiming under him and third persons, but do not apply in cases of testamentary disposition by the client as between different parties, all of whom claim under him. The privilege does not belong to the executors as against the next of kin, but following the legal interest is subject to the trusts and incidents to which the legal interest is subject.

On a bill by the next of kin of a deceased party against his executors, who were his residuary

RUSSELL v. JACKSON.

THIS was a motion on the part of the Defendants *William Jackson* and *Thomas Aston Jackson* to suppress the depositions of *Solomon Bray* in answer to the 13th interrogatory under the first commission, and to the 6th, 7th, 8th, 9th, 11th, 12th, and 13th interrogatories under the second commission for the examination of witnesses in the cause. The motion had been ordered to stand over until the hearing, and was now made, the case having been opened and the evidence in question tendered for the Plaintiff.

*Joseph Russell*, the testator in the cause, by his will, dated the 8th of July, 1840, gave the residue of his estate to the Defendants *William Jackson* and *Thomas Aston Jackson*, as a testimony of his esteem for them, and as a compensation to them for their trouble as his executors; and appointed them to be the executors of his will.

The bill was filed by one of the testator's next of kin, alleging that the gift of the residue to the Defendants, the *Jacksons*, was upon a secret trust for founding a socialist school at *Birmingham*; and that the gift was made upon the undertaking by the Defendants to carry that purpose into effect, and praying relief accordingly.

devises and legatees, alleging that the gift of the property was made to them upon a secret trust for the foundation of a school, the solicitor of the testator, who was also, after the death of the testator, the solicitor of the Defendants, the executors, was examined as a witness for the Plaintiff. On a motion by the Defendants to suppress the depositions of the solicitor on the ground of professional confidence:—*Held*, that the communications between the testator and the solicitor might be read; and that the communications between the Defendants, the executors, and the solicitor, after the death of the testator, were privileged.

A privilege given for the protection of the client cannot have the effect of excluding evidence of a trust which he had intended to create, and thus defeat a claim by the parties who accepted the trust, to hold the trust property beneficially.

Communications between solicitor and client, through the medium of an agent, are protected equally with communications had directly with the principal.

The existence of an illegal purpose would prevent any privilege from attaching to the communications between solicitor and client—*Semble*.

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Statement.

*Solomon Bray*, the witness whose depositions the motion was made to suppress, was the solicitor by whom the will was prepared; and after the death of the testator he acted as the solicitor of the Defendants, the *Jacksons*. Upon his examination under the first commission, he stated in his answer to the 13th interrogatory, that the testator gave the residue to the Defendants, intending them to hold it upon a secret trust; but he demurred to the question, what was the nature of the trust? and he also demurred to various other questions which were put to him, as to the instructions for the will and the mode in which it was prepared, and the communications which he had with the testator and with the Defendants, the *Jacksons*, respecting it, assigning, as grounds of demurrer, that he had acted in the matters in question as the solicitor of the testator and of the Defendants, the *Jacksons*, respectively. This demurrer, having been set down for argument, was overruled by the Court, no one appearing to support it; and upon his examination under the second commission, the witness stated, that the general purport and effect of the instructions which he received for preparing the testator's will were declaratory of his intention to leave his property for the purpose of establishing a school for the education of children in the doctrines of socialism, and, so far as the witness recollected, according to the principles of *Robert Owen*; and that the instructions contained the scheme on which the testator intended that the proposed school should be conducted. That, upon receiving the instructions, which it appeared by the first examination had been brought to him by the Defendant *William Jackson*, he intimated to that Defendant doubts whether the law would permit such a disposition of the testator's property as was contemplated by the instructions in respect to the school. That, upon his subsequently seeing the testator in the presence, as he best recollected, of both the *Jacksons*, he referred to the instructions and repeated his doubts as to the legality of the

intended disposition; and that the testator then said, that, having confidence in the two Defendants, he would leave his property to them, being satisfied that they would carry out his intentions, which they well knew; and that the Defendant *William Jackson* assented to this; and that the Defendant *Thomas Aston Jackson*, if he was present, did not dissent from it. That he inserted a power of sale in the will, which would not have been necessary but for the purposes agreed upon between the *Jacksons* and the testator; and that, at the time of his delivering over to the Defendant *William Jackson* the instructions for the will, which by the former examination appeared to have been upon an occasion of his seeing that Defendant on matters of business after the death of the testator, he told that Defendant he would require the instructions to enable him to carry out the testator's intention.

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Mr. *Malins* and Mr. *Speed* for the Plaintiff.

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Mr. *Walker* and Mr. *Kirkman* for the Defendant heir-at-law, who was also one of the next of kin of the testator.

The *Solicitor-General* and Mr. *W. M. James* for the Attorney-General.

Mr. *Rolt* and Mr. *E. F. White* for the Defendants, the *Jacksons*, in support of the motion to suppress the depositions.

The authorities cited against the admission of the depositions were: *Wilson v. Rastall* (a), *Cromack v. Heathcote* (b), *Chant v. Browne* (c), *Jones v. Pugh* (d), *Beer v. Ward* (e), *Cholmondeley v. Clinton* (f), *Flight v. Robin-*

(a) 4 T. R. 753.

(b) 2 Bro. & Bing. 4.

(c) 7 Hare, 79.

(d) 1 Ph. 96.

(e) Jac. 77, 82.

(f) 19 Ves. 261.

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*son* (a), *Herring v. Clobery* (b), *Wheatley v. Williams* (c), *Doe v. Harris* (d), *Reax v. Withers* (e), *Turquand v. Knight* (f); Taylor on Evidence, Vol. 1, p. 627; Phillipps on Evidence, Vol. 1, p. 171, 9th edit. Against the motion to suppress the depositions: *Bramwell v. Lucas* (g), *Follett v. Jefferyes* (h), *Desborough v. Rawlins* (i), and *Walker v. Wildman* (k), were cited.

*Judgment.*  
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VICE-CHANCELLOR:—After stating the nature of the suit, and the depositions of *Solomon Bray*, which have been mentioned—

The question is, whether the statements thus made by this witness, or any of them, ought to be received in evidence against these Defendants. This question must be separately considered with reference to the communications which were had in the lifetime of the testator, and those which were had after his decease; but I do not think, that, with reference to the communications which were had in the testator's lifetime, any distinction can properly be made between the communications which were had with the testator and those which were had with the Defendant *William Jackson*; for I think that the Defendant *William Jackson*, in the communications then had with him, must be considered to have acted as the agent of the testator, and as the channel of communication between him and the witness; and I think that the protection which the law throws round communications of this nature, extends to them when had through the medium of an agent, as

(a) 8 Beav. 22.

(b) 1 Ph. 91.

(c) 1 M. & W. 533.

(d) 5 Car. & Pay. 592.

(e) 2 Camp. 578.

(f) 2 M. & W. 98.

(g) 2 B. & C. 745.

(h) 1 Sim., N. S., 1.

(i) 3 My. & Cr. 515.

(k) 6 Madd. 47.

far as it would extend to them if had with the principal.

As to the communications which were had in the lifetime of the testator, I am of opinion that the evidence ought to be admitted. It is evident that the rule which protects from disclosure confidential communications between solicitor and client, does not rest simply upon the confidence reposed by the client in the solicitor, for there is no such rule in other cases, in which at least equal confidence is reposed: in the cases, for instance, of the medical adviser and the patient, and of the clergyman and the prisoner. It seems to rest, not upon the confidence itself, but upon the necessity of carrying it out. Lord Brougham, in *Greenough v. Gaskell* (a), gives, I think, the true foundation of it. He says: "It is founded on a regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case" (b). This then being the foundation of the rule, the Courts, when called upon to apply it, must of course have regard to the foundation on which it rests, and not extend it to cases which do not fall within the mischief it was designed to prevent. In cases where the rights and interests of the client or of those claiming under him come in conflict with the rights and interests of third persons, there can be no difficulty in applying the rule. If it was not applied in such cases, the client could never with safety state to his solicitor the true position of his case. He would be driven

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(a) 1 My. &amp; K. 98.

(b) Id. 103.

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to speculate as to what it would be for his interest to divulge. The prosecution or defence of his rights could not be adapted to the circumstances as they really existed, and the courts of justice would be embarrassed with imperfect information arising from imperfect communication; but when we pass from the case of conflict between the rights and interests of the client and parties claiming under him, and those of third persons, to the case of testamentary disposition by the client, do the same reasons apply? The disclosure in such cases can affect no right or interest of the client. The apprehension of it can present no impediment to the full statement of his case to his solicitor, unless indeed he is contemplating an illegal disposition, a case to which I shall presently refer; and the disclosure when made can expose the Court to no greater difficulty than presents itself in all cases where the Courts have to ascertain the views and intentions of parties, or the objects and purposes for which dispositions have been made. In the cases of testamentary dispositions, the very foundation on which the rule proceeds, seems to be wanting; and in the absence, therefore, of any illegal purpose entertained by the testator, there does not appear to be any ground for applying it.

Can it then be said that the communication should be protected, because it may lead to the disclosure of an illegal purpose. I think that it cannot; and that evidence which would otherwise be admissible, cannot be rejected upon such a ground. On the contrary, I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communication. Where a solicitor is party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the



means of evading the law. Another view of the case is, that the protection which the rule gives is the protection of the client; and it cannot I think be said to be for the protection of the client that evidence should be rejected, the effect of which would be to prove a trust created by him, and to destroy a claim to take beneficially by parties who have accepted that trust.

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*Judgment.*

The argument on the part of the Defendants was, that the privilege did not terminate with the death of the client; that it belongs to a purchaser from the client, and must equally belong to a volunteer under him; that it follows the legal interest, and must rest in the executor claiming under the will, and not in the next of kin claiming adversely to it. That the privilege does not in all cases terminate with the death of the party, I entertain no doubt. That it belongs equally to parties claiming under the client as against parties claiming adversely to him, I entertain as little doubt; but it does not, I think, therefore follow, that it belongs to the executor as against the next of kin in such a case as the present. In the one case the question is, whether the property belongs to the client or his estate, and the rule may well apply for the protection of the client's interest. In the other case the question is, to which of two parties claiming under the client the property in equity belongs; and it would seem to be a mere arbitrary rule, to hold that it belongs to one of them rather than to the other. Besides, if the privilege be one which follows the legal interest, it must, I think, be subject to the incidents to which the legal interest is subject; and if the legal interest be subject to a trust, the privilege must be subject to it also. And in this view of the case, to permit the Defendants to avail themselves of the privilege, would be to permit them by the use of the privilege to exclude the question, whether they were trustees of it or not. These are the views which I entertain upon this

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question, without reference to the authorities. Those which were cited on the part of the Defendants, do not appear to me to affect the question. The general remarks which are to be found in the books must, of course, be understood with reference to the cases in which they are found, and none of those cases at all approach to the present. They were all cases arising between the clients or parties claiming under them and adverse claimants.

There are cases, however, which, I think, approach more nearly to the present, and support the opinion I have formed. Cases in which the Court has received and acted upon such evidence without objection. In *The Duke of Bedford v. The Marquis of Abercorn* (a), the Court received and acted on the evidence of a solicitor as to the intention of parties to marriage articles, and directed a settlement differing from the articles mainly upon the truth of such evidence; and in *Nourse v. Finch* (b), where the question was, whether executors were trustees for the next of kin of an undisposed of residue, the evidence of the solicitor who had prepared the will, as to what had passed between him and the testator, was received and minutely commented upon in the judgment. These cases, and particularly the latter, have, I think, a strong bearing upon the present; and upon the authority of them, as well as upon principle, my opinion upon the whole is, that the evidence as to the communications which took place in the testator's lifetime must be received.

With respect to the evidence as to what passed with the Defendant *William Jackson*, upon the occasion of the instructions for the will being delivered to him after the death of the testator, I think the case stands upon a different footing. This was clearly a communication between

(a) 1 My. & Cr. 312.

(b) 1 Ves. jun. 344, 359.

solicitor and client in the course of professional business, and all principle and all authority are against its admission. The depositions, therefore, to this extent ought to be suppressed.

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 }  
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 ———  
*Judgment.*

PIDDOCKE v. SMITH (a).

Dec. 11th &  
 13th.

MR. W. H. Terrell moved on behalf of the Plaintiff, that a person named in the motion might be appointed guardian ad litem, without a commission for that purpose, to the Defendant *Thomas Piddocke*, a lunatic, not so found by inquisition.

A guardian ad litem to a Defendant shewn by affidavit to be a lunatic, but not so found by inquisition, appointed without a commission.

Affidavits were filed by the wife of the lunatic (b) and his medical attendant (c), to prove his lunacy; and by the

(a) Ex relatione.

(b). "I, *Elizabeth Piddocke*, make oath and say, that my husband, the said *Thomas Piddocke*, is of the age of fifty-one years and upwards, and that he has, during the period of eight years last past, been decidedly of unsound mind, and wholly unfit for the management of himself and of his affairs; that he talks in an incoherent manner, and manifests a total want of power to direct his attention steadily to any one subject for five minutes; that he is at times very violent, and that his habits are very destructive; and that he is wholly unfit to put in an answer as defendant in the above-mentioned suit. And I further make oath and say, that no commission of lunacy hath been issued against him."

(c) "I make oath and say, that I am well acquainted with the said *Thomas Piddocke*; and that I have been in the habit of visiting him as his medical attendant for two years last past and upwards; and that the said *Thomas Piddocke* is now, from imbecility of mind, totally incapable of putting in an answer as defendant in the above-mentioned suit, or of transacting any business. And I further make oath and say, that I visited him on the 4th day of November, 1851; and that after sufficient personal examination of the said *Thomas Piddocke*, I am fully convinced that his mind is now unsound; and that, by reason of such unsoundness of mind, he is wholly unfit for the management of himself and of his affairs. And I further make oath and say, that

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solicitor in the cause, proving that the person named was a fit and proper person to be appointed guardian ad litem.

Mr. *H. F. Bristowe* was instructed to appear for the lunatic. *Drant v. Vause* (a) and *Howlett v. Wilbraham* (b) were cited.

The VICE-CHANCELLOR suggested, that the case should be mentioned to the Lord Chancellor.

*Dec. 13th.* Mr. *W. H. Terrell* applied to the Lord Chancellor, citing the above cases, and

*Judgment.* The LORD CHANCELLOR, after reading the affidavits, made the order.

the unsound state of mind of the said *Thomas Piddocke* is rendered manifest by a very great loss of memory and understanding, so as to render him incapable of discourse, or of directing and continuing his attention to any subject, and by the want of all connection in what he says. And I further say, that, as I have been

informed and verily believe, the said *Thomas Piddocke* is of the age of fifty-one years and upwards; and that there is not, in my judgment and opinion, any chance of the said *Thomas Piddocke* ever recovering his faculties."

(a) 2 Y & C. C. 524.

(b) 5 Madd. 423.

HARRISON v. RANDALL.

**T**HE bill was filed to set aside an appointment, made by a deed poll of the 3rd of October, 1832, of the bonuses up to the year 1830, on two policies of insurance, effected in the Equitable Life Insurance Office, on the life of Colonel *Gwynne*; and for a declaration by the Court, that a surrender of such bonuses made to the office by *Jonathan Brundrett* was a breach of trust; and for the purpose of charging the estate of *Brundrett* with the amount of the bonuses.

Colonel *Gwynne* was tenant for life of an estate in *Wales*, with remainder to his eldest son in tail. He had a son and eight daughters by his first wife *Mary Anne Gwynne*; and the policies of insurance in the Equitable, and other policies which he effected on his own life in the Pelican

the several appointees; for the Court will not undo part of an entire transaction, the other parts of the same transaction not being brought within its jurisdiction.

Where there is an appointment to *A.* and *B.* by one instrument, (and a fortiori by different instruments), the appointment to *A.* may be good, and the appointment to *B.* bad, and *A.* and *B.* may well agree between themselves that the bad appointment shall not be disturbed.

A trustee is not, in all cases, to be made liable upon the mere ground of having deviated from the strict letter of his trust; for such deviation may be necessary or beneficial to the interests of the cestui que trusts; but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the peril of afterwards satisfying the Court that the deviation was necessary or beneficial.

The existence of a suit in which an appointment of trust-funds made in execution of a power is brought before the Court, and directions consequential thereto are obtained, and the trustees retire and are succeeded by others, but in which material facts connected with such appointment of the trust-funds are not brought to the knowledge of the Court, does not protect the retiring trustees from the liabilities which result from such facts, if they involve a breach of trust; but, on the contrary, renders such breach of trust less excusable.

Certain policies of insurance effected by a father on his life as a provision for his daughters, were assigned to a trustee, upon trust for such of the daughters as the father should appoint; and certain estates were devised to the same trustee, upon trust, out of the rents and profits to secure the payment of the premiums. The trustee advanced some sums of money in payment of the premiums, and the father appointed the bonuses which had accrued upon the policies to three of his daughters; and the three daughters soon afterwards authorised the trustee to receive the sum paid by the office for the bonuses, and invest part thereof as a fund to keep down the premiums, and a part of the sum was applied in satisfaction of the arrears of such premiums. A subsequent appointment was made, in favour of the other daughters, of the residue of the sums to be received on the policies, and which was intended to equalise the shares:—*Held*, that the first appointment was a fraud upon the power, its immediate object being to relieve the father, and its necessary consequence to relax the diligence of the trustee in enforcing the rights of the daughters against the father; and that the application of the trust funds, in pursuance of the appointment by the trustee, who knew that the appointment was fraudulent, was a breach of trust, for which he was responsible to the objects of the power.

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July 16th,  
17th, 19th,  
21st, & 22nd.  
1852.

Jan. 19th.

The Court will not entertain a suit to set aside an appointment of a part of certain trust funds as a fraud upon the power, when it appears that another appointment, not impeached by the bill, was made of funds subject to the same power, in which regard was had to the appointment complained of, and the object was to equalise the interests of

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and Albion Insurance Offices, were the provisions which he made for his daughters.

By an indenture dated the 12th of May, 1803; Colonel *Gwynne* assigned a policy of insurance for 4000*l.* on his life in the Pelican office, to *Thomas Lowten*, upon trust, to receive the amount which should be payable upon it on his death, and to pay the same as his wife *Mary Anne Gwynne* should by deed or will appoint; and in default of appointment, to her, if she should survive him; but if she should die in his lifetime, to his children who should be living at her death, and to the issue of any of them who should be then dead, excepting an eldest or only son; the shares of sons to be vested at twenty-one, and of daughters at twenty-one or marriage, with the usual provisions for survivorship; and by this deed he demised some parts of the estates, of which he was tenant for life, to *Lowten*, for a term of ninety-nine years, if he should so long live, upon trusts, for securing the payment of the premiums upon this policy.

By an indenture of the 18th of December, 1811, Colonel *Gwynne* assigned another policy of insurance for 1000*l.* on his life, in the Pelican office, to *Lowten*, upon trusts, which, so far as related to the children, were similar to those declared by the former deed; and by this deed he also demised to *Lowten* other parts of the estates of which he was tenant for life, upon trusts, for securing the payment of the premiums upon this policy.

*Mary Anne Gwynne* the wife died in the year 1818, having by her will appointed the 4000*l.* assured by the first policy, as to 100*l.* to the son, and as to 3900*l.* to the eight daughters equally; but she made no appointment of the 1000*l.* assured by the second policy; and upon her death, therefore, the eight daughters became entitled to the 1000*l.*

Pelican policy as in default of appointment, and, subject only to any claim of the son for the 100*l*., to the 4000*l*. Pelican policy under her appointment.

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In the month of August, 1821, *S. F. Gwynne*, the eldest son of Colonel *Gwynne*, had attained the age of twenty-one years; and at this time Colonel *Gwynne* had effected four other policies of insurance on his life, one for 4000*l*. and another for 1000*l*. in the Equitable office, and two in the Albion office for the same sums of 4000*l*. and 1000*l*.; and he had mortgaged the 1000*l*. Equitable policy to *Philpott*, and the 1000*l*. Albion to another person.

Arrangements were then come to between *S. F. Gwynne* and his father for suffering recoveries and resettling the estates, and for making provision for the eight daughters; and by a deed of the 28th of August, 1821, expressed to be made between Colonel *Gwynne*, *S. F. Gwynne*, and another, and *Jonathan Brundrett*, reciting an agreement to suffer recoveries and convey the estates, and to vest the six policies of insurance in a trustee for the daughters, to secure 500*l*. a year to the son during the life of the father, and to subject a part of the estates to trusts for keeping up the policies, and reciting the recovery deeds and certain deeds by which the six policies were stated to be assigned to *Brundrett* upon trusts for the daughters, with a covenant by Colonel *Gwynne* to exonerate the two 1000*l*. policies from the mortgages to which they were subject, Colonel *Gwynne* conveyed the estates to the uses referred to, and, as to part thereof, to the use of *Brundrett* for a term of 1000 years, upon trust, out of the rents and profits, or by mortgage or sale or otherwise, to pay the premiums of the six policies and the expenses of the trust, and, until it should be expedient to raise the same, to permit the rents and profits to be received by the person entitled to the hereditaments. This deed was not executed by *Brundrett*;

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nor were the deeds recited in it, and by which the policies were purported to be assigned, executed by any of the parties thereto; but by another indenture of the 1st of October, 1821, expressed to be made between *T. Lowten*, Colonel *Gwynne*, *S. F. Gwynne*, and *Brundrett*, after reciting the deed of May, 1803, and that *T. Lowten*, a party thereto, was the executor of *Lowten* the trustee, and was desirous to be discharged from the trusts, Colonel *Gwynne* appointed *Brundrett* to be the trustee under the deed of 1803; and the 4000*l.* Pelican policy was purported to be assigned by *Lowten* to *Brundrett* upon the trusts of the deed and of *Mary Ann Gwynne's* will; and by this deed Colonel *Gwynne* and *S. F. Gwynne* assigned the other policy in the Pelican and the policies in the Equitable and Albion offices, upon trust for all or any one or more of the daughters of Colonel *Gwynne* by *Mary Ann* his late wife, or of any one or more of the children or other issue (as therein mentioned) of the said daughters or any of them, in such manner and form, and (if more than one) in such parts, shares, and proportions, and for such times, with such limitations over or substitutions in favour of any one or more of the others of the daughters or their children and issue respectively, and either by way of annuity, legacy, portion, remainder, present or remote interest, or otherwise, and to vest and be payable, and paid, transferred, and assigned at such time or times, age or ages, and upon such contingencies, and under and subject to such directions and regulations as Colonel *Gwynne* from time to time by deed or will should appoint. And, in default of such appointment, upon the same trusts as had been declared of the policy for 4000*l.* by the will of the wife. These deeds were executed by Colonel *Gwynne* only, and were not executed either by *Lowten* or *Brundrett*.

*Brundrett* was a solicitor in *London* in partnership with other persons: their firm paid the premiums on the poli-



cies of insurance for many years; and Colonel *Gwynne*, it appeared, was irregular in making the remittances to meet these payments. In this state of things the deed poll of the 3rd of October, 1832, impeached by the bill, was made. Colonel *Gwynne* by this deed, reciting that bonuses had been from time to time declared on the Equitable policies, appointed all such bonuses to his daughters *Catherine*, *Jane*, and *Edmundtina*, who were then of age, equally.

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 v.  
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 —  
*Statement.*

After the execution of this deed poll, and on the 24th of October, 1832, Colonel *Gwynne*, and *Catherine*, *Jane*, and *Edmundtina* signed an authority addressed to Colonel *Gwynne* and *Brundrett*, empowering them to receive the bonuses, and invest the same in Government funds in *Brundrett's* name, or that of any future trustee; with liberty for *Brundrett*, or any future trustee, to sell out of such funds any sums which might be necessary to pay the premiums on the policies, until he could procure the same from the estates; and Colonel *Gwynne* thereby agreed to make good, out of the rents and profits of the estates, any loss which might arise in selling and repurchasing the stock. This authority appeared never to have been acted upon; for on the 24th of November, 1832, the same parties signed a further authority to Colonel *Gwynne* and *Brundrett*, empowering them to receive the bonuses amounting to 3683*l.* 19*s.*, and invest 1600*l.* in Consols, with liberty to apply the funds so invested as expressed in the former authority; and also to discharge a lien of 50*l.* claimed by a solicitor who held one of the policies.

It appeared that Mr. *Brundrett* soon afterwards obtained the opinion of counsel, and was advised that the proposed appointment was, in the language of equity, a fraud upon the power. The opinion pointed out certain other modes, as less dangerous expedients for dealing with the bonuses, to effectuate the intention expressed in the authori-

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ty. After the date of this opinion, and by a deed of the 14th of December, 1832, a further appointment was made by Colonel *Gwynne*, whereby, after reciting the deeds of August and October, 1821, and the appointment of October, 1832, Colonel *Gwynne* appointed the principal of both the equitable policies, the two sums of 4000*l.* and 1000*l.*, in trust for his four daughters *Charlotte*, *Julia*, *Emma*, and *Georgiana*, who did not take under the appointment of the bonuses; and the deed contained a proviso, that if either *Emma* or *Georgiana* should die under 21 and unmarried, her share should go to *Catherine*, *Charlotte*, *Jane*, *Julia*, and *Edmundtina*, and the survivor of *Emma* and *Georgiana*; and if both died, then to *Catherine*, *Charlotte*, *Jane*, *Julia*, and *Edmundtina*.

The bonuses which had been declared upon the Equitable policies up to 1830, and which were appointed by the deed of the 3rd of October, 1832, amounted to 6570*l.*, for which the office were willing to pay 3683*l.* 19*s.* From comparing this amount with the amount of the principal of the Equitable policies, and allowing for the difference of the number of the appointees under the two deeds, and from a paper of calculations proved in the cause, it appeared that the deed of the 14th of December, 1832, proceeded upon the principle of putting the seven daughters, who were appointees under the deed polls, upon as nearly as possible the same footing. An agreement between the three appointees under the deed poll of the 3rd of October, 1832, and Colonel *Gwynne*, appeared to have been prepared under *Brundrett's* directions, to be signed by the appointees, but was not executed. This agreement recited all the transactions, and provided for the application of the 1600*l.* to the payment of the premiums on the policies, and for the residue of the monies to arise from the surrender being handed over to the three appointees; and it contained a recital that the rents of the property conveyed upon

trust to secure the payment of the premiums, consisting principally of the mansion-house in which Colonel *Gwynne* and all his unmarried daughters resided, were insufficient to pay such premiums, and the same had often been in arrear; that *Brundrett* had advanced 229*l.* 14*s.* 2*d.* to prevent a forfeiture of the policies; that he had intimated an intention to enter upon the mansion-house and lands, and lease the same; that Colonel *Gwynne* and his daughters *Catherine*, *Jane*, and *Edmundtina* were very desirous to continue to reside in the mansion-house, and that Colonel *Gwynne* should occupy the lands; and for that purpose had concurred in his application that the 229*l.* 14*s.* 2*d.*, and the 50*l.* referred to, and such further sums as Colonel *Gwynne* might require for satisfaction of the premiums, not exceeding 1600*l.*, should be paid out of the 3683*l.* 19*s.*; and *Brundrett* had, at the request of the three appointees, consented to abstain from entering on the property until after a certain notice.

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On the 15th of December, 1832, immediately after the execution of the deed poll of the 14th of December, the three appointees under the deed poll of the 3rd of October, 1832, gave a power of attorney to *Brundrett* to receive the 3683*l.* 19*s.* from the Equitable office, and thereupon to surrender the appointed bonuses, which *Brundrett* accordingly did on the 19th of December, 1832, signing a receipt for the 3683*l.* 19*s.* as for himself, and also as attorney for the appointees. In January, 1833, Colonel *Gwynne* attorned tenant to *Brundrett*, as trustee of the 1000 years term.

Pending these proceedings *Lowten* had instituted a suit to be discharged from the trusts of the deeds of 1803 and 1811; and *Brundrett* had joined in this suit to be also discharged from the trusts; but upon the arrangement being made for the surrender of the policies, and for the receipt and investment of the 3683*l.* 19*s.*, he agreed to continue

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in the trust. When, however, the appointees refused to allow more than the 1600*l.* to be retained, he again determined to retire, and a supplemental bill was filed in the cause for that purpose. This bill stated the deeds poll of the 3rd of October and the 14th of December, 1832, and the receipt by *Brundrett* of the 3683*l.* 19*s.*; but did not state any of the circumstances under which those deeds were executed. By decree, dated the 11th of February, 1833, it was referred to the Master to appoint new trustees of the six policies and of the residue of the terms of years; and the costs were ordered to be taxed and paid out of the 3683*l.* 19*s.* in the hands of *Brundrett*, (which sum the decree described as received by him in respect of accumulations on the Equitable policies,) and *Brundrett* was thereby ordered to pay the residue to *Catherine, Jane*, and *Edmundtina Gwynne*; and *Lowten* and *Brundrett* and all other proper parties were ordered to join in conveying and assuring the trust premises to the new trustees. Two new trustees, named *Harries* and *Rice*, were appointed in pursuance of the decree, and the trust premises were assigned to them by a deed dated the 30th of May, 1833.

In May and June, 1833, *Brundrett* paid the taxed costs, and paid over the balance of the 3683*l.* 19*s.* to *Catherine, Jane*, and *Edmundtina*, deducting, however, 423*l.* 15*s.* 6*d.* which he had paid for premiums on the policies of insurance. This closed the transactions with *Brundrett*.

By a deed poll dated the 6th of June, 1833, Colonel *Gwynne* appointed the Albion Policy of 4000*l.* to *Catherine, Jane*, and *Edmundtina*, in equal shares, and the Albion Policy of 1000*l.* to *Augusta*, and the future bonuses on the Equitable Policies to *Catherine, Jane, Edmundtina, Charlotte, Augusta, Julia, Emma*, and *Georgiana*, in equal shares. *Catherine, Jane*, and *Edmundtina* subsequently lent to Colonel *Gwynne* the sum of 1624*l.* upon a mortgage of his

life estate, subject to prior mortgages thereon. This mortgage was made by a deed dated the 13th of June, 1833. By another deed, dated the 24th of August, 1836, made between *Catherine, Jane, and Edmundtina*, and their five sisters, reciting that the appointment of the Albion Policy of 4000*l.* was intended to have been for the benefit of all the daughters, and was made in favour of the three by mistake, the three daughters agreed to stand possessed of that policy in trust for the eight daughters to receive one equal eighth part thereof apiece.

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*Statement.*

Colonel *Gwynne* died on the 6th of September, 1836, insolvent. By a deed of the 12th of April, 1837, *E. Herbert* was appointed a trustee in the place of *Rice*, who desired to retire; and shortly afterwards *Herbert* retired, and *T. France* was appointed in his stead. In September, 1837, *France* applied to *Brundrett* on behalf of *Emma* and *Georgiana*, the two youngest daughters, complaining of the appointment of the bonuses by the deed of the 3rd of October, 1832; but no further steps were taken until after the death of *Brundrett*, which took place in May, 1841.

The bill was filed by *Emma* and *Georgiana*, the two youngest daughters, who were infants at the time of the appointment complained of, against *Randall* and *Simmons*, the personal representatives of *Brundrett*, and *Harries* and *France*, the trustees, and the other daughters of Colonel *Gwynne*, or the parties who represented them.

The executors of *Brundrett*, by their answer, stated, that the appointment of the 14th of December, 1832, was made in consideration of, and as compensation for that of the 3rd of October, 1832; and that the Plaintiffs had taken the benefit of the appointment of December, and were therefore bound to give effect to that of October, or make compensation to the parties thereto for its failure; and they

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relied upon the suit and the decree of February, 1833, as having been adopted and acted upon by the Plaintiffs and the trustees appointed under the same.

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*Argument.* Mr. Swanston, Mr. James Parker, and Mr. Haddan, for the Plaintiffs.

Mr. Chandless and Mr. Peachey for the other daughters of Colonel Gywnne and the parties representing them.

Mr. Bethell, Mr. Willcock, and Mr. Prendergast, for the Defendants Randall and Simmons, the personal representatives of Brundrett.

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VICE-CHANCELLOR, after stating the facts:—

*Judgment.* This case may, I think, conveniently be considered in three points of view:—First, whether *Jonathan Brundrett* ever became liable to the Plaintiffs in respect of the matters in question in this suit; secondly, if he did become so liable, whether this suit is properly constituted for enforcing such liability; and thirdly, if it be not properly constituted, whether the bill should be dismissed without reservation; and, if it be properly constituted, whether there should be an absolute decree against the Defendants, or what directions should be given for the purpose of working out the justice of the case.

Upon the first of these points I am of opinion that *Jonathan Brundrett* was liable to the Plaintiffs in respect of these matters. I think it clear that he accepted the trusts of these policies; and equally clear that the appointment of the 3rd of October, 1832, was a fraud upon the power; and I think that *Brundrett* must be taken to have known it to be so at the time when he surrendered the policies,

and paid over the monies which he received upon the surrender. After the cases which have been decided upon the subject of fraudulent appointments, it is hardly necessary, I think, to say anything upon this appointment being a fraud upon the power; but it may be observed, that its immediate object was to relieve the father, and that its necessary consequence would be to relax the diligence of the trustee in enforcing the rights of the children against him; and it may be useful further to observe, that where a trustee, having good reason to doubt the validity of an appointment, thinks proper to act upon it, he must, in my opinion, be affected by the consequences which follow upon the act; and, in the present case, we have the monies, which were paid over to the appointees, immediately lent to the father upon a mortgage of his life interest only. That *Brundrett* knew the appointment to be fraudulent, I think, sufficiently appears from the advice which he received.

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Judgment.

A trustee who, having good reason to doubt the validity of an appointment, thinks proper to act upon it, must be affected by the consequences which follow upon the act.

The transaction was attempted to be justified upon the ground of the necessity of the case; but I cannot hold it to be justified upon that ground. I take the rule of the Court upon that point to be clear. A trustee is not, in all cases, to be made liable upon the mere ground of his having deviated from the strict letter of his trust. The deviation may be necessary, or may be beneficial; but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the peril of afterwards satisfying the Court that the deviation was necessary or beneficial; and the Defendants have given no evidence to satisfy me that it was either necessary or beneficial that this appointment should be made.

If such a transaction as the present could have been excused in any case, I think it could not have been excused in this; for there was a suit actually pending in this Court at the time when the transaction took place, and in that

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*Judgment.*

suit the very appointment in question was brought forward; and yet the facts connected with the appointment were not put upon the record, but a decree was taken for paying over the fund to the appointees, the Court being kept in ignorance of those facts.

If therefore this case depended upon the first point, the original liability of *Brundrett*, I should have no hesitation in making a decree in favour of the Plaintiffs; but upon the second point my opinion is, that this suit is not properly constituted to enforce the liability. Looking at the deeds, the calculations, and the correspondence in this case, I am of opinion that the deed of the 14th of December, 1832, is directly and immediately connected with the deed of the 3rd of October, 1832; and that the deed of December is in truth no more than a cover for the deed of October, and never would have existed if the latter had not been executed; and yet this bill is strictly confined to the bonuses appointed by the deed of October, and does not bring the deed of December within the power of the Court. What the Plaintiffs are in effect seeking by this bill is, to undo part of an entire transaction; and I think it is neither consistent with the practice of the Court or the justice of the case so to deal with the transaction. The practice of the Court is not to undo transactions in part. That it is not consistent with the justice of the present case to do so is obvious, for the effect, if not in some manner corrected, would be to leave each of the daughters who is Plaintiff in possession of 1250*l.* received under the appointment of December, part of the fraudulent appointment, and at the same time to give them their shares of the bonuses for default of appointment by reason of the same fraud.

It may be said, that this might be set right by compelling the Plaintiffs to account for the 1250*l.* already received; but, supposing it to be so, which I doubt, still justice could



not be done; for the other daughters, who took under the appointment of December, could not, I think, be compelled upon this bill to refund what they have received. I think that, upon this objection being pointed out as it was, though not very distinctly by the answer, it was incumbent on the Plaintiffs to have amended and put the whole transaction under the power of the Court; and that, they having neglected to do this, the suit is irregularly constituted, and the bill must therefore be dismissed.

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Judgment.

The question then to be considered is, whether it should be dismissed without reservation; and I am of opinion that it should not, but that it should be dismissed without prejudice to a new bill, for I think that the Plaintiffs have shewn that they had a right against *Brundrett*; and I think that something might possibly have been coming to them, if their case had been properly framed. I desire not to be understood to give the least encouragement to the filing of a new bill; for I do not think that, under any circumstances, I could have made a decree in this case without directing inquiries as to the extent of the knowledge of the Plaintiffs; and I have a strong suspicion what the result of such inquiries would have been; for, although it may well be, as was put on behalf of the Plaintiffs in the argument, that in an appointment to *A.* and *B.* by one instrument, and *a fortiori* by different instruments, the appointment to *A.* may be good, and the appointment to *B.* bad. It may equally well be, that *A.* and *B.* may agree between themselves that the bad shall not be disturbed; and I have not much doubt what the effect of such an agreement would be, if it was afterwards sought to charge the trustee. It is unnecessary, however, to decide anything upon that point. I dismiss this bill upon the ground, that, under the circumstances of this case, the appointments of October and December, 1842, must stand or fall together, and this bill does not enable them so to be dealt with. As to costs, I am of

Effect of an agreement between several appointees under different appointments, as between such appointees and the trustees of the property, that one of the appointments, which is invalid, shall not be disturbed.

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 Judgment.

opinion, that they must be paid by the Plaintiffs, for I see no ground for saddling the estate of *Brundrett* with costs, which arise, as I think, from a mistake of the Plaintiffs.

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Jan. 31st. IN THE MATTER OF THE TRUST ESTATE OF ELIZABETH SPENCER; AND OF THE TRUSTEE RELIEF ACT (a).

A trust fund paid into the Court of Chancery, under the Trustee Relief Act, after the death of the cestui que trust, ordered to be paid to the administrator of the cestui que trust under a grant of letters of administration by the Archdeaconry Court, obtained after the fund was in the Court of Chancery.

Where a diocesan probate is proper with reference to the situation of the assets at the death, it remains so notwithstanding they may afterwards be rightfully or wrongfully removed out of the diocese.

**ROBERT RAINE** by his will, dated in 1828, gave his tenant right to his farm at *Elmsthorp*, in the county of *Leicester*, and his personal estate, to his trustees and executors, upon trust for his children, with directions to convert the same into money when the youngest child should attain twenty-one, and to divide the same amongst his five children, the sons to have 50*l.* a-piece more than the daughters. *Elizabeth*, one of the daughters, married *William Spencer* of *Earl Shilton*, in the county of *Leicester*, and died in 1845. *Spencer*, the husband, died in 1847, having appointed *Joseph Sharp Spencer* his executor, who proved his will in the Archdeaconry Court of *Leicester*. In 1848, the youngest child of *Robert Raine*, the testator, attained twenty-one, when the trustees of his will paid 396*l.*, her share of his residuary estate, into Court, under the Trustee Relief Act. In 1851, *Joseph Sharp Spencer*, the executor of *Spencer* the husband, obtained letters of administration to the estate of *Elizabeth Spencer* the wife, from the Archdeaconry Court of *Leicester*, and presented his petition, praying that the 396*l.* might be paid to him.

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Argument.

*Mr. Bird*, for the petitioner, submitted that, notwithstanding the payment of the fund into Court by the trus-

tees, the Court would order the payment out to the petitioner, without a prerogative administration, and upon the title acquired under the letters of administration granted by the Archdeaconry Court. He submitted, that, inasmuch as there were no bona notabilia of *Elizabeth Spencer*, at her death, out of the archdeaconry of *Leicester* (a), the letters of that Court were valid; and that, to require a prerogative administration, would be to substitute voidable letters of administration for valid ones.—He cited the observation of Sir *James Wigram* in *Jones v. Howell* (b), that it “depends on the question, whether bona notabilia were out of the diocese. The circumstance, that property in which the party was interested now comes to be administered in this Court, does not affect the question.” *Druce v. Denison* (c); *In re Knowles* (d), which resembled the present case, except in the circumstance that the letters of administration were granted to the petitioner *before* the payment of the fund into Court by the trustee. *Scarth v. Bishop of London* (e) was also referred to.

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*In re*  
 TRUST ESTATE  
 OF SPENCER,  
 AND THE  
 TRUSTEE RE-  
 LIEF ACT.  
 —  
*Argument.*

The VICE-CHANCELLOR said he was apprehensive, that, to depart from the rule which required a prerogative probate,

*Judgment.*  
 —

(a) An affidavit of a brother of *Elizabeth Spencer* stated, that she died at *Earl Shilton*, in the county and archdeaconry of *Leicester*; and that her whole property, of or to which she or her husband in her right was possessed or entitled at the time of her decease, consisted of her share, then undivided, of the unconverted farming stock and effects, the property of her father *Robert Raine*, which were, at such time of her decease, in and upon the farm-house and lands at *Elmthorpe*, in the said

county and archdeaconry. It would seem, however, from the observations of the Lords Justices, (post, p. 413, n. (a)), that this affidavit was not necessary, there being nothing in the case that suggested the existence of bona notabilia of *Elizabeth Spencer* out of the local jurisdiction at the time of her death.

(b) 2 Hare, 353.

(c) 15 Sim. 356.

(d) Before the Lords Justices, 24th of November, 1851.

(e) 1 Hagg. Ecc. Rep. 636.

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OF SPENCER,  
AND THE  
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—  
*Judgment.*

on the ground that there were not at the death of the party bona notabilia out of the local jurisdiction, would lead to great expense in endeavours to shew where the property of the deceased party was situated; and he suggested, that as the case *In re Knowles* had lately been before the Lords Justices, it would be desirable that the present application should be mentioned to their Lordships.

Mr. Bird afterwards stated, that, having applied to the Lords Justices on the point, their Lordships were pleased to intimate their opinion, that the order for payment upon the archdeaconry letters might be properly made; that where diocesan letters were proper, with reference to the situation of the assets at the death of the party, they would remain so, notwithstanding any subsequent change in their locality,—that a change of the place of the goods after the death of the party did not affect the right or power of the ordinary,—and that a prerogative probate was not rendered necessary by the fact of some person, rightfully or wrongfully, after the decease of the testator, removing the goods out of the diocese (a).

(a) The reporter has been favoured with a note of some observations made by their Lordships on this application:—Sir J. L. Knight Bruce, L.J., said, “In the case of *Knowles*, I think Lord Cramworth intimated that his opinion, as there expressed, as to a diocesan probate, would extend to such a case as this; and I confess that is my impression also. I take the question in *Druce v. Denison* to have been a question of the place of the property, as between *London* and *Canterbury*.

The Bank of *England* and the seat of government are both within the diocese of *London*, and necessarily within the province of *Canterbury*; but if the personalty had a place (so far as it could have a place) within the diocese of *London*, and there were no other property of the party, probate would as properly belong to the diocese of *London* as to the Archbishop. That was the point in *Druce v. Denison*, but that does not touch the case of any other diocesan probate than

The VICE-CHANCELLOR made the order.

1851.

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TRUST ESTATE  
OF SPENCER,  
AND THE  
TRUSTEE RE-  
LIEF ACT.

Order.

"Upon hearing the said petition, probate of the will of *Robert Raine* the testator, &c., letters of administration of *Elizabeth Spencer*, granted by the Archdeaconry Court of *Leicester* to *Joseph Sharp Spencer*, the petitioner, &c., this Court doth order &c."

a *London* probate. Nobody, for instance, could say, the 3l. per cent. Consols were within the diocese of *Carlisle*. I suppose the decision to be this,—if a testator dies possessed of stock standing in his name, and (no change having taken place in the investment) a *London* probate is taken out, that will do in the absence of proof that there were goods also in another diocese, inasmuch as stock (so far as it can be said to have a locality) may be said to be situate in the diocese of *London*. That is what *Druce v. Denison* decided. It also decided, what perhaps scarcely needed a decision,—that it is not necessary to inquire, as a matter of course, whether a man dies possessed of goods in two dioceses. I believe it to be settled, that if a man dies in *Carlisle*, having no property whatever but 3l. per cents. standing in his name, the *Carlisle* probate will not do: that is matter of decision, whether founded on principle or not."

Lord *Cranworth*, L. J., said,—

"The title of the ordinary is complete at the death of the party in the diocese. Suppose, after the death of the party in the diocese, having no goods out of it, some stranger were to remove the goods into another diocese, could not an action of trover be maintained on a diocesan probate?—The question in ancient times as to the right of the ordinary depended upon this,—whether, at the death of the intestate, there were or were not bona notabilia out of the diocese. Following that principle out, if the party dies, and afterwards a sum of 10,000l., part of his assets, be carried out of the diocese and brought into the Bank of *England*, I think, in an action for the money, the Court would be bound to say the diocesan letters were enough. If I recollect what Lord *Cottenham* decided in *Druce v. Denison*, it was, that as a consistorial probate is not necessarily bad, the Court presumes it to be proper until the contrary is shewn."

1851.

Nov. 6th.

IN THE MATTER OF JOHN FIELD'S MORTGAGE, AND  
OF THE TRUSTEE ACT, 1850.

A residuary devise of all the testator's estate, personal and real, although made subject to the payment of his debts, passes the legal estate in premises of which the testator was mortgagee in fee, notwithstanding the case of *Silvester v. Jarman*.

**JOHN FIELD**, the mortgagee in fee of gavelkind lands, died in March, 1851, leaving three sons, two of whom were infants, and having by his will, dated in 1850, devised his property in the following words:—"All the residue of my estate, personal and real, property, monies, and securities for money, and all other effects, which shall remain *after paying my just debts*, funeral and testamentary expenses, I give and devise unto my wife *Anna Maria Field*, for her own use and benefit." The executors of the mortgagee and the mortgagor applied by petition for an order to vest the legal estate in the two undivided third parts of the mortgaged premises (which it was suggested had descended upon the infant sons of the mortgagee), according to the appointment of the mortgagor, on payment of the mortgage money.

Mr. *Jessel* for the petition said, that the difficulty which had occasioned the petition arose from the case of *Silvester v. Jarman* (a), in which the subjection of the estate to the payment of debts had been held to exclude from the devise the legal estate in the mortgaged premises.

The VICE-CHANCELLOR was of opinion that the legal estate was well devised, notwithstanding the residue was made subject to debts; and that, therefore, no estate in the mortgaged premises descended to the infants.

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No order made.

(a) 10 Price, 78.

1851.

CALDWELL v. VANVLISSENGEN.

CALDWELL v. VERBECK.

CALDWELL v. ROLFE.

Dec. 1st, 8th,  
9th, & 20th.

THESE were motions, on the part of the Plaintiffs in three several causes, for injunctions to restrain the respective Defendants from using or exercising, within the limits of that part of the United Kingdom called *England*, the dominion of *Wales*, and the town of *Berwick-upon-Tweed*, including the seas, rivers, and havens thereof, the invention of *James Lowe*, or any mode or process for the propulsion of vessels merely colourably differing therefrom, and from using or employing, or permitting to be used and employed, within the limits aforesaid, any vessel fitted or provided with a propeller constructed and applied, without the license of the Plaintiffs, according to the form and mode respectively described in the specification of *James Lowe's* patent, or merely colourably differing therefrom, and particularly from permitting certain vessels mentioned in the several notices of motion, or any other vessel or vessels within the limits aforesaid, under the command or control of the Defendants, and fitted or provided with a propeller or propellers constructed and applied, without the license of the Plaintiffs, according to the form and mode aforesaid, or merely colourably differing therefrom, to proceed on any voyage or voyages.

Injunction granted against subjects of the kingdom of Holland, to restrain them from using on board their ships within the dominions of England, without the license of the plaintiffs, an invention, to the benefit of which the Plaintiffs were exclusively entitled under the Queen's Patent.

Foreigners in this country, as well as British subjects, are liable to actions for the injury done by their infringing upon the sole and exclusive right granted by the Crown to patentees of inventions in conformity with the law and constitution of this country; and

the powers of the Court of equity, which are founded on the insufficiency of the legal remedy, must be enforced against them as well as against British subjects.

The Crown has always exercised a control over the trade of the country; and though restrained by the common law and the Statute of Monopolies (21 Jac. 1, c. 3) within reasonable limits, the Crown might grant the exclusive right to trade with a new invention for a reasonable period. The stat. 21 Jac. 1, c. 3, did not create but controlled the power of the Crown in granting to the first inventors the privilege of the sole working and making of new manufactures.

The prohibitory words of the patent, which are addressed only to the subjects of this country, are in aid of the grant and not in derogation of it.

Where a legal right exists, the Court cannot refuse to interfere for its protection, upon grounds which depend exclusively on considerations of national policy.

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 CALDWELL  
 v.  
 VANVLISSEN-  
 GEN.  
 CALDWELL  
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 CALDWELL  
 v.  
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 Statement.

The Plaintiffs were the assignees of *James Lowe's* patent (which was granted in the year 1838) for a mode of propelling vessels by means of one or more curved blades, set or affixed on a revolving shaft below the water-line of the vessel, and running from stem to stern of the vessel. The Defendants in the two first causes were the owners of vessels called the *Burgemeester Huidekoper* and *Stad Dordrecht*, trading between *Holland* and this country; and the Defendant in the third cause was or had been the captain of a vessel called the *Fyenoord*, engaged in the same trade.

The Defendants in the two first causes by affidavits, and in the third cause by the answer, disputed the validity of the patent, and the fact of the enjoyment by the patentees of the exclusive right which they claimed under it; and they alleged that the use of their invention by the parties by whom the ships had been built, and to whom they belonged, had been acquiesced in. It appeared, that various actions and suits had been brought by the parties to whom the benefit of the patent had been assigned, all of which had terminated by the submission of the Defendants in such suits to pay certain royalties in respect of the use of the invention; and upon such submission and arrangements the proceedings had not been further prosecuted. The Defendants, moreover, relied upon the facts which were thus stated in the affidavit of *Tzebbe Swart*:—The deponent said he was and had been, since the 23rd of March, 1850, the master of the ship *Burgemeester Huidekoper*; that he was born in the kingdom of *Holland*, and that he was and always had been a subject of that kingdom; that the said vessel belonged to a Company which was formed in *Holland* in 1848, and called the "*Amsterdam Screw Schooner Company*;" that the said Company consisted of a great number of shareholders or partners; and that all the shareholders or partners were, as he verily believed, natives and sub-



jects of *Holland*, and resided in that country; and that no *Englishman* had, as he verily believed, any share or interest whatever in the Company, or in the ships, property, or effects thereof; that the Company was established for the purpose of trading with steam ships between *Amsterdam* and other countries; that, for the purposes of the Company and the trade for which the same was so as aforesaid established, a vessel named the *Burgemeester Huidekoper* was, in the year 1849, built and fitted up with the same propelling power as that which was now and always had been used for the propulsion of the said vessel, by the defendant *Vanvlissengen* and workmen in his employ at *Amsterdam*, for and on behalf and by order of the Company; that the said vessel was bonâ fide built and fitted up with her steam-engines and propelling power in the kingdom of *Holland* by and for the natives and subjects of the said kingdom, and that no *Englishman* was in any way employed in building or fitting up the said vessel; that the vessel was so built and fitted up according to the most approved course of ship-building then in use in *Holland*; that all the machinery and propelling power with which the vessel was as aforesaid fitted up, or which had since been used for the purposes of the said vessel, were manufactured by the said Defendant at *Amsterdam* aforesaid; that, some time before the said vessel was so built and fitted up, the same propelling power as that used for the said vessel had been openly used and exercised in the said kingdom of *Holland*; that he was and always had been altogether ignorant of and unacquainted with *James Lowe*, and with an alleged invention of the said *James Lowe* for certain modes of propelling vessels, and also with a patent alleged to have been obtained by the said *James Lowe* in respect of such alleged invention; that he verily believed, that the said ship was built and fitted up in ignorance of any such patent, and according to the most approved principles of ship building and maritime machinery then in use in

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the kingdom of *Holland*; that no patent had been granted, or, as he was informed and verily believed, applied for in the kingdom of *Holland* for or in respect of such alleged invention; that it was competent for *English* subjects, who might have discovered any new or valuable invention, to apply for and obtain a patent for the sole use of the same in the kingdom of *Holland*, and such patents are frequently applied for and obtained; that the said ship sailed and was entitled to sail under and to carry the national flag of *Holland*, and was entitled to trade with and to enter the ports of all countries at peace with *Holland*, and to depart therefrom at pleasure; that the crew of the said vessel were all natives of *Holland*; that, before the said vessel was built and fitted up with the propelling power used on board the same, another steam ship had been built and fitted up by the Defendant *Vanvlissengen* for and by order of the Company; and that the said other steam ship was built and fitted up in the same manner and with precisely the same propelling power as the *Burgemeester Huidekoper*; that the deponent was mate of such other vessel, and the same vessel had, before the *Burgemeester Huidekoper* was fitted up with such propelling power as aforesaid, traded between *Amsterdam* and *London*, and had made many voyages between those respective ports with such propelling power as aforesaid; that, until the month of September last, he never heard that the Plaintiffs or the said *James Lowe*, or any other person, did or could raise any objection to the use of such propelling power as that now as aforesaid in use in the said vessel called the *Burgemeester Huidekoper*, or make any claim in respect thereof; and that he verily believed, that, previously to the said month of September, no objection or claim was made by the Plaintiffs or the said *James Lowe*, or any other person, in respect of the said vessels or either of them, although he verily believed that the Plaintiffs and the said *James Lowe* must have well known that the said vessels had for upwards of two

years and a half been from time to time trading to and from *London*; that various other steam ships had been built and fitted up in the kingdom of *Holland* by and on behalf of natives and subjects of the said kingdom upon the same principle and with the same propelling power as the ship *Burgemeester Huidekoper*; and that very large sums of money had been expended in building and fitting up such vessels; and he believed, that the same had respectively been built and fitted up in ignorance of the said alleged patent of *James Lowe*; that a very large proportion of the trade of *Holland* consisted in the export of articles of consumption from *Holland* to *England*, and in the importation of goods and merchandise from *England* to *Holland*; that such trade was now, and had been for some time past, mainly conducted by and by means of steam ships built and fitted up in the same manner and with the same propelling power as the ship *Burgemeester Huidekoper*; that such trade was in his judgment and belief of great advantage to both the said countries; that such trade would be greatly prejudiced, if such steam ships were prevented from trading between the said countries; and that large sums of money had been expended by the said Company in the building and fitting up of the said ship *Burgemeester Huidekoper*; and that very serious loss would be sustained by the Company, if the sailing of the steam ship *Burgemeester Huidekoper* were to be restrained by the injunction of this Court.

The report is chiefly confined to the argument and judgment upon the facts raised by this affidavit.

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Mr. *Rolt* and Mr. *Amphlett* for the Plaintiffs in the three causes.

1. The Plaintiffs have proceeded against various bodies

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of shipowners, public companies, and others; and the Defendants have always submitted to pay the royalty and the costs of the proceedings. These proceedings are sufficient to establish their exclusive right:—*Boulton v. Bull* (a), *Harmer v. Plane* (b), *Hill v. Thompson* (c), *Collard v. Allison* (d), *Stevens v. Keating* (e), *Universities of Oxford and Cambridge v. Richardson* (f).

2. The lawful manufacture of the machine in a foreign country, out of the reach of the jurisdiction of the *English* Courts, is no justification for the importation and use of the machine, so manufactured, within the dominions to which the patent extends: *Universities of Oxford and Cambridge v. Richardson* (g). Suppose the patent had been for a stationary engine. The Defendants might lawfully have made it in *Holland*; but does it follow that they might bring it to and erect and use it in *England*? There could be no distinction in such a question between a stationary and a locomotive engine.

The *Solicitor-General* with Mr. *Baggallay*, for the Defendant *Vanvlissengen*, and with Mr. *Eddis*, for the Defendant *Verbeck*.

Mr. *Bacon* and Mr. *Miller* for the Defendant *Rolfe*.

The following points were argued against the injunction: 1. That the patent was void for want of a proper specification: 2. That the patent was at least of doubtful validity; and that there had been no possession under it to justify the Court in granting an injunction, until the right had been established in an action at law.—3. That,

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| (a) 3 Ves. 140.                          | (e) 2 Ph. 333.                     |
| (b) 14 Ves. 130; <i>S. C.</i> , 11 East, | (f) 6 Ves. 707—Per Lord <i>Ed-</i> |
| 101.                                     | don.                               |
| (c) 3 Mer. 622.                          | (g) 6 Ves. 689, 709.               |
| (d) 4 My. & Cr. 487.                     |                                    |

assuming that the Defendants were to be regarded on this question as having the same rights as *English* subjects would have, the Court would not interfere by injunction against them, after they had been permitted for two years and a half to use the invention publicly, and to incur great expenses in constructing ships adapted to such use.—4. That the Court would not exercise its jurisdiction to grant an injunction restraining the use by foreigners of the patent on board a ship built in a foreign country at amity with *England*, and manned and owned by the subjects of that country.—And, 5, that, even if any injunction should be granted, it could not extend to the sailing of the ships having the machine on board, so as to prevent them from leaving a *British* port to return to *Holland*.

Upon the second point, the cases of *Hills v. University of Oxford* (a), *Collard v. Allison* (b), and *Losh v. Hague* (c), were cited. On the third point, the effect of the lawful manufacture of a patented invention was insisted upon, as conferring a subsequent right to use the article so manufactured; the case was likened to that of a carriage having a patent axle made abroad, and there purchased by a foreigner and brought to this country as his travelling carriage; and it was contended that the Court would not, in such a case, grant an injunction to restrain the party from using his carriage. So, in the case of a patent chair, as *Minter's* chairs, (*Minter v. Williams* (d)): might not a chair, the subject of that patent, be purchased abroad and imported and used by the purchaser in his own house? Could it be said, that a party who had constructed an improved instrument—as, for example, a telescope—for which a patent is afterwards obtained, would be thenceforward deprived of the right of using the telescope which he had

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(a) 1 Vern. 275.

(b) *Ubi supra*.

(c) Webst. Pat. Cas. 200.

(d) 4 Ad. & E. 251.

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previously and lawfully made? On this part of the argument the case of *Roebuck v. Stirling* (a) was mentioned; in which it was held, that a *Scotch* patent was bad in a case where there had been a previous user in *England*.

On the fourth and fifth points it was contended, that the language of the grant itself shewed, that the exclusive right was not assumed to be given as against the subjects of a foreign country. The grant was addressed to *British* subjects only. If a right of this kind were asserted against foreigners coming to this country, it would be a source of great inconveniencia. There was not an article which a foreigner might bring to this country for his use or comfort, but might be the subject of a patent, and, therefore, the subject of an application against him. The right, if it existed, might even be asserted against a ship accidentally driven into an *English* port by a tempest, or stranded on the coast. The case was wholly different from that of a subject. A subject could not lawfully construct the machine; it would be an infringement of the patent, and the transaction would therefore throughout be tainted with illegality. In this case, the manufacture of the machine being perfectly lawful, it was now sought to make the use of it only unlawful. But the machine having been lawfully made and placed in the ship, how could it be contended, that it became, at a subsequent time, unlawful to use, or even to permit the machine to remain, in the ship? When did the user cease to be lawful? It was also perfectly clear, that, beyond the limits of *British* ports at least, it would be lawful for the Defendants again to use the screw. A foreigner was placed in a different position from an *English* subject; for an alien, not domiciled in this country, could not obtain a *scire facias* to repeal a patent. The treaties with *Holland* and the principles of

(a) Collection of Cases in the House of Lords, fol., Vol. 23, p. 291, (1774, 1775). Linc. Inn Library.

international law required, that the ships of *Holland*, at amity with this country, should have free ingress and egress to and from our ports, subject to the ordinary customs payable by the most favoured nations.

Mr. *Rolt* replied.

The Defendants did not allege that they were the inventors of the screw, or that it was not the invention of the patentee, the model of which they had obtained in this country. But even if the invention had been made and used abroad, and afterwards a patent had been obtained in this country by another person, the Court would restrain the foreign inventor from infringing the patent in this country; it was his omission that he did not previously secure himself by obtaining an *English* patent. The distinction is between previous use in any other part of the realm, as in *Scotland*, and use in a foreign country. The argument as to the application of the injunction against foreigners simply amounted to this: that any foreigner might infringe a patent in this country, and the patentee is without remedy. The title to be placed on the footing of the most favoured nations, cannot entitle the subjects of a foreign state to privileges greater than those enjoyed by *British* subjects. Every foreigner in this country owes obedience to its laws; and as he is subject to the criminal, so he is to the civil jurisdiction of the Courts of justice, and amongst the rest to be sued in this Court.

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VICE-CHANCELLOR:—

Upon the argument of these motions, and particularly of the motion in the first of the above causes, it was insisted on the part of the Defendants, that the injunctions ought not to be granted: first, because the patent was invalid for

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want of novelty, and for several insufficiencies and other imperfections in the specification; secondly, because there had been no such enjoyment under the patent as would warrant the interference of this Court before the validity of the patent was established at law; and, thirdly, because the Plaintiffs and those under whom they claim have, as it is said, acquiesced in the use of the invention by the Defendants. But on examining the affidavits on these points, I think that the Defendants have not established such a case of acquiescence as will preclude the interference of the Court. They have, I think, made out such a case as renders it incumbent on the Court to put the Plaintiffs upon an undertaking to bring an action (the interference of the Court in cases of this nature being founded upon the legal right); but I do not think the case they have made out is such as would justify the Court in withholding its interference until the legal right has been tried.

The question, whether the Court will interfere to protect a patentee before he has established his right at law, or will suspend its interference until the right at law has been established, appears to me to depend upon very simple principles. It is part of the duty of this Court to protect property pending litigation; but when it is called upon to exercise that duty, the Court requires some proof of title in the party who calls for its interference. In the case of a new patent, this proof is wanting: the public, whose interests are affected by the patent, have had no opportunity of contesting the validity of the patentee's title, and the Court therefore refuses to interfere until his right has been established at law. But in a case where there has been long enjoyment under the patent (the enjoyment, of course, including use), the public have had the opportunity of contesting the patent; and the fact of their not having done so successfully affords, at least *primâ facie*, evidence that the title of the patentee is good; and the Court there-

Principles upon which the Court will interfere to protect a patentee before he has established his right at law in the case of patents which have been long used or enjoyed, or will, in the case of new patents, suspend its interference until the right at law has been established.



fore interferes before the right is established at law. In the present case, I think that the plaintiffs have proved such a case of enjoyment under the patent, and of their title having been maintained at law against the several attempts which have been made to impeach it, that the Court is bound at once to interfere for their protection, unless there are other sufficient grounds for withholding its interference.

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It was insisted, on the part of the Defendants, that there was in each of these cases a sufficient ground for the interference of the Court being withheld. [His Honor stated the affidavit of *Tzebbe Swart (a)*, and the cases stated by the Defendants,—the Defendant in the third cause stating that he had ceased to be master of the ship.] It is to be observed, that in none of these cases is it attempted to be denied, on the part of the Defendants, that the screw propellers used in their respective vessels fall within the invention claimed by this patent; and after anxiously considering the case, I am of opinion that I cannot withhold these injunctions, upon the grounds which are stated.

I take the rule to be universal, that foreigners are in all cases subject to the laws of the country in which they may happen to be; and if in any case, when they are out of their own country, their rights are regulated and governed by their own laws, I take it to be not by force of those laws themselves, but by the law of the country in which they may be adopting those laws as part of their own law for the purpose of determining such rights. Mr. Justice *Story*, in his Treatise on the "Conflict of Laws," addressing himself to this subject (s. 541), says—"In regard to foreigners resident in a country, although some jurists deny the right of a nation generally to legislate over them, it would seem clear, upon general principles of international law, that

If, in any case, the rights of foreigners out of their own country are governed by their own laws, it is not by force of those laws themselves, but by the law of the country in which they may be, adopting those laws as part of their own law for the purpose of regulating such rights.

(a) *Supra*, p. 416.

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v.

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such a right does exist, and the extent to which it should be exercised is a matter purely of municipal arrangement and policy. *Huberus* lays down the doctrine in his second axiom: All persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof. *Boullenois* says, 'That the sovereign has a right to make laws to bind foreigners in relation to their property within his domains, in relation to contracts and acts done therein, and in relation to judicial proceedings if they implead before his tribunals. And further, that he may of strict right make laws for all foreigners who merely pass through his domains, although commonly this authority is exercised only as to matters of police.' *Vattel* asserts the same general doctrine, and says, that foreigners are subject to the laws of a state while they reside in it" (a). In this country indeed the position of foreigners is not left to rest upon this general law, but is provided for by statute: for, by the 32 Hen. 8, c. 16, s. 9, it is enacted, "That every alien and stranger born out of the King's obeisance, not being denizen, which now or hereafter shall come in or to this realm or elsewhere within the King's dominions, shall, after the 1st of September next coming, be bounden by and unto the laws and statutes of this realm, and to all and singular the contents of the same." Natural justice indeed seems to require that this should be the case: when countries extend to foreigners the protection of their laws, they may well require obedience to those laws as the price of that protection. These Defendants, therefore, whilst in this country, must, I think, be subject to its laws.

It is to be considered then, what are the laws of this country with reference to the rights of patentees. According to our laws and constitution, the Crown, I apprehend, has at all times exercised a control over the trade of the country. Anterior to the statute 21 Jac. 1, c. 3, it assumed

(a) Page 789, 2nd edit. Lond.

to exercise that control to a very prejudicial extent, by the creation of monopolies; and in the great "Case of Monopolies(a)," such an exercise of its powers was held to be illegal; but it was at the same time held, that the Crown had power to grant, as a recompense for any new invention, the exclusive right to trade on it for a reasonable period. What was to be considered as a reasonable period does not appear to have been settled. By the statute of *James* (b) it was fixed at fourteen years; and thus, as explained by Lord *Coke*, in his commentaries on the statute, in the Third Institute (c), the statute did not create, but controlled, the power of the Crown in the granting of patents. Patentees, therefore, have always derived and still derive their rights, not from the statute, but from the grant of the Crown.

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We must consider then what is the effect of this grant? It purports to give to the grantee, his executors, administrators, and assigns, special license, full power, sole privilege and authority, that he, his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy and deputies, servants or agents, or such others as he, his executors, administrators, or assigns shall at any time agree with, and no others, from time to time, and at all times thereafter, during the term of years therein expressed, lawfully to make, use, exercise, and vend his said invention, within that part of the United Kingdom of *Great Britain* and *Ireland* called *England*, the dominion of *Wales*, and the town of *Berwick upon Tweed*. And undoubtedly this grant gives to the grantee a right of action against persons who infringe upon the sole and exclusive right purported to be granted by it.

(a) 11 Rep. 85a; *S. C.*, Noy, 173, nom. *Darcy v. Alluin*.

(b) 21 Jac. 1, c. 3.

(c) Cap. lxxxv. against Monopolies, &c., p. 181.

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Foreigners coming into this country are, as I apprehend, subject to actions for injuries done by them whilst here to the subjects of the Crown. Why then are they not to be subject to actions for the injury done by their infringing upon the sole and exclusive right, which I have shewn to be granted in conformity with the laws and constitution of this country? And if they are subject to such actions, why is not the power of this Court, which is founded upon the insufficiency of the legal remedy, to be applied against them as well as against the subjects of the Crown. It was said, that the prohibitory words of the patent were addressed only to the subjects of the Crown; but these prohibitory words are in aid of the grant and not in derogation of it; and they were probably introduced at a time when the prohibition of the Crown could be enforced personally against parties who ventured to disobey it. The language of this part of the patent, therefore, does not appear to me to alter the case.

In the course of the argument upon these motions, I put the question whether, in the case of a railway engine patented in *England*, and not in *Scotland*, the engine, if made in *Scotland*, could be permitted to run into *England*; and I might have added, whether, if the invention we are now considering was patented in *England* and *Scotland*, and not in *Ireland*, steam boats propelled by means of it would be permitted to run from *Dublin* into *Holyhead*, *Bristol*, and *Glasgow*. The answer which I received to this question was, that in the case of patents there was a difference between *Scotland* and foreign countries; that a prior user in *Scotland* would, although a prior user in foreign countries would not, invalidate an *English* patent: but this answer does not appear to me to meet the question—What previous user will invalidate a patent; and what user, if any,

What previous user will invalidate, and what user, if any, can

be admitted in contravention of the patent right, are different questions, depending, one upon the extent of previous knowledge, the other upon the effect of the grant.

can be permitted in contravention of the patent right, are different questions depending on wholly different considerations; the one upon the extent of previous knowledge, the other upon the effect of the grant.

It was further argued on the part of the Defendants, that the use by them of this invention was not such a user or exercise of the invention as would amount to an infringement of the patent; and some observations, which fell from Lord *Eldon* in *The Universities of Oxford and Cambridge v. Richardson* (a), were cited on this point, as was also the case of *Minter v. Williams* (b), in which it was intimated, that there might be an innocent use of a patent invention. But I do not think those authorities at all assist the case of the Defendants. On the contrary, the case of *The Universities of Oxford and Cambridge v. Richardson* appears to me to be very much in favour of the Plaintiffs; for Lord *Eldon* there draws a marked distinction between user for the purposes of trade and other user. It is true that he there speaks of cases of necessity; but surely it cannot be said that the use of this invention by the Defendants is a matter of necessity. Their use of it is purely for the purposes of trade, and is no otherwise necessary than as the means of securing to them increased profit by their trade. If, indeed, any of their vessels were stranded, and it became necessary to sell the propeller, that might be a case of necessity falling within the range of Lord *Eldon's* observations. So again, in the case of *Minter v. Williams*, I find no trace of a user for the purposes of trade being considered as innocent.

In the argument on the part of the Defendants, much was said on the hardship of this Court's interfering against them, and upon the inconveniences which would result

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Whether there might not be a case of necessary user of an invention which the Court would not regard as the infringement of a patent—*Quære*.

(a) 6 Ves. 689.

(b) 4 Ad. & E. 251.

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 CALDWELL  
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 v.  
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 CALDWELL  
 v.  
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 ———  
*Judgment.*

from it; and some reference was made to the policy of this country: but it must be remembered that *British* ships certainly cannot use this invention without the license of the patentees, and the burthens incident to such license; and foreigners cannot, I think, justly complain that their ships are not permitted to enjoy, without license and without payment, advantages which the ships of this country cannot enjoy otherwise than under license and upon payment. It must be remembered, that foreigners may take out patents in this country, and thus secure to themselves the exclusive use of their inventions within her Majesty's dominions; and that, if they neglect to do so, they, to this extent, withhold their invention from the subjects of this country. It is to be observed also, that the enforcement of the exclusive right under a patent does not take away from foreigners any privilege which they ever enjoyed in this country; for, if the invention was used by them in this country before the granting of the patent, the patent I apprehend would be invalid.

One principal ground of inconvenience suggested was, that if foreign ships were restrained from using this invention in these dominions, English ships might equally be restrained from using it in foreign dominions; but I think this argument resolves itself into a question of national policy, and it is for the legislature, and not for the Courts, to deal with that question: my duty is, to administer the law and not to make it.

Upon the grounds which I have referred to, I think that the facts stated in the affidavits and answer do not furnish sufficient grounds for refusing these injunctions.

I think, however, that, the Defendant *Rolfe* having ceased to be captain of the vessel mentioned in the third suit, and being no longer in a position to infringe the pa-

tent, and there being no evidence of any intention on his part to resume the infringement, the injunction as to him ought not to be granted. I do not think that the Court would be justified in acting on the suspicion, that it is intended to re-appoint him, at all events without such a case being made upon the record. I think, also, that the injunction in the other suits must be qualified.

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RESTRAIN the Defendants, unless and until they shall have obtained the license of the Plaintiffs so to do, from using or exercising, or causing or permitting to be used or exercised, within the limits of that part of the United Kingdom called *England*, the dominion of *Wales*, and the town of *Berwick-upon-Tweed*, the invention of *James Lowe* in the bill mentioned, or any mode or process for the propulsion of vessels merely colorably differing therefrom; and in particular restrain the Defendants, unless and until so licensed as aforesaid, from propelling the vessels in the bills mentioned, or causing or permitting the same to be propelled within the limits aforesaid, with or by means of the propellers now attached thereto, and from propelling the same vessels, or any other vessels or vessel, or causing or permitting the same to be propelled within the limits aforesaid, with or by means of any propellers or propeller constructed and applied according to the form and mode respectively described in the specification of the said *James Lowe's* patent, or merely colorably differing therefrom. The usual undertaking of the Plaintiffs to bring actions. Liberty to apply.

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Minute.

1851.

Dec. 11th &  
20th.  
1852.

Jan. 13th.

The obligation imposed upon a husband, suing for the property of his wife, of doing equity by making a settlement, is not enforced by the Court upon the bill being filed, nor upon the decree being made, where the interest is in reversion, (for the Court only deals with the interest in possession); but the obligation is enforced when the property comes to be distributed.

On the principle that marriage is a gift of the personal property of the wife to the husband, there is no distinction between property to which the wife is entitled in equity and property to which she is entitled at law.

The wife's equity for a settlement does not depend on any right of property in her, but rests on the control which Courts of equity exercise over property falling under their dominion.

The right to a settlement is an obligation which the Court fastens, not upon the property, but upon the right to receive it.

## OSBORN v. MORGAN.

THE plaintiff, Mrs. *Osborn*, was entitled to a fourth share of the residuary estate of a testator, of which a part was immediately distributable, and another part consisted of a sum of Consols, invested to provide for an annuity of 50*l.* bequeathed by the will for the life of the annuitant. The husband of Mrs. *Osborn* had become bankrupt, and his assignees had applied to the trustees of the will for payment of his wife's share of the estate. The wife filed her bill for the execution of the trusts of the will. The annuitant was still living.

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Mr. *Rolt* and Mr. *Rodwell*, for the wife, asked for a settlement of her reversionary interest in the Consols, as well as out of that portion of the residuary estate which was immediately payable.

The VICE-CHANCELLOR inquired whether there was any authority for directing such a settlement to be made.

Mr. *Rolt*.—There is no reason or principle opposed to such a settlement, and it is in conformity with the rule of the Court, which requires the consent of the wife before parting with her interest in property with which the Court is dealing. The reversion is a property which may now be sold; it is therefore a property of present value, and which may be made the subject of contract and settlement. If it be said that the marriage is a gift of the wife's property to the husband, we ask that he may settle what he



has acquired under that gift; that the Court will only permit him to take it on those terms. If it be said that he has not reduced it into possession, and that his interest is, therefore, no more than a chance, we ask for a settlement of that chance or possibility.

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Mr. *Bacon* and Mr. *Faber* for the assignees.

Mr. *Prior* for the trustees.

Mr. *Nalder* for the husband.

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VICE-CHANCELLOR:

The question which stood for judgment in this case was, whether a married woman could compel the assignees of her husband to make a settlement upon her out of reversionary property to which she was entitled in equity. It was admitted in argument that no case could be found in which a Court of equity had compelled such a settlement; and the absence of such a case would, I think, alone have been sufficient to have determined the question; but in my opinion it is clear, both upon principle and authority, that such a settlement cannot be compelled. Marriage is a gift to the husband of all the personal property to which the wife is entitled in possession, and of all the personal property of which she may become entitled, subject only to the condition of his reducing it into possession during the coverture; and I am aware of no distinction in this respect between property to which the wife is entitled in equity, and property to which she is entitled at law. Nor upon principle can there be any such distinction, the rule resting as I conceive upon this,—that the husband and wife are in law one person,—a rule which prevails in equity as much as at law. The wife's equity for a settle-

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 —  
*Judgment.*

ment, therefore, does not depend upon any right of property in her; and that it does not depend upon any such right of property is the more clear, when it is considered to what limitation it is subject. The amount is discretionary in the Court, and if the wife insists upon it, she must claim it for herself and her children, and not for herself alone,—limitations which are wholly inconsistent with a right of property in her.

Origin of the  
 wife's equity  
 for a settlement.

The right then being thus independent of property, there seems to be no ground on which it can rest, except the control which Courts of equity exercise over property falling under their dominion. It is, in truth, the mere creature of a Court of equity, deduced, as I conceive, originally, where the husband sued, from the rule that he who comes into equity must do equity; and subsequently extended to suits by the trustees and the wife, probably, from the necessity of the Court administering the trust,—whether the husband thought proper to sue or not. We must consider, then, when this obligation of doing equity is enforced by the Court. It is not upon the bill filed; for the bill may be afterwards dismissed. It is not, as I think, upon the decree being made, where the Plaintiff's interest is in reversion; for, in such cases, the Court only deals with the interest in possession. It is, I think, when the property comes to be distributed; for then, and not till then, in ordinary cases does the Court enforce obligations attaching upon the property otherwise than by contract. This right to a settlement, therefore, I take to be an obligation which the Court fastens, not upon the property, but upon the right to receive it; and that this is the case is, I think, the more clear from this consideration:—if the right attaches at all, it must attach with all its incidents. One of its incidents is, that the wife waiving it must waive it by her consent in Court; but it is now settled that the Court cannot take her consent to part with her reversion-

The Court cannot take the consent of the wife to part with her reversionary interest.

ary interest. Upon the whole, therefore, I am of opinion that the Plaintiff's claim for a settlement out of the reversionary interest, whilst it continues reversionary, cannot be supported; and authority is not wanting to support this view:—Sir William Grant in *Woollands v. Crowcher* (a), speaking of this right, says, the ordinary occasion for it is, “where the husband applies to have paid to him money that belongs presently and immediately to his wife (b);” and Sir John Leach in *Pickard v. Roberts* (c) is yet more distinct, for he says, “My opinion is, that a wife by her consent in a Court of equity can only depart with that interest which is the creature of a Court of equity,—the right which she has in a Court of equity to claim a provision by way of settlement on herself and children out of that property which the husband at law would take in possession in her right. Her equity arises upon his legal right to present possession. This principle has no application to a remainder or reversion; when the remainder or reversion falls into possession, then the equity arises. If the wife by her consent could pass a remainder or reversion in personal property to the husband, she would not only part with a future possible equity, but with her chance of possessing the whole property by surviving her husband; and to give this effect to her consent, would make it analogous to a fine at law with respect to real estate—a principle always disclaimed in a Court of equity. A Court of equity interferes to protect the property of the wife against the legal rights of the husband, and will never lend itself as an instrument to enable the husband to acquire a right in the wife's personal property, which he can by no means acquire at law.”

I cannot therefore accede to that part of the prayer which asks for a settlement out of this reversionary interest.

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The consent of the wife taken in a Court of equity to part with her interest in property about to be distributed, is not analogous to a fine at law with respect to real estate.

A Court of equity will not lend itself as an instrument to enable a husband to acquire a right in his wife's property, which he has no means of acquiring at law.

(a) 12 Ves. 174.

(b) *Id.* 177.

(c) 3 Madd. 384.

1851.

Nov. 3rd, 4th,  
5th, & 18th.SPARROW v. THE OXFORD, WORCESTER, AND  
WOLVERHAMPTON RAILWAY COMPANY.

A Railway Company having given notice of their intention to purchase lands for the undertaking, deposited the purchase-money, and delivered the bond (according to the provisions of the 85th section of the Lands Clauses Consolidation Act), before the expiration of the period prescribed for the exercise of their compulsory powers; neither their power to purchase the land, nor their power to enter, is gone by the subsequent expiration of that period.

The powers for the compulsory purchase and taking of lands referred to in the 123rd section of the Lands Clauses Consolidation Act, are powers given to the several promoters of the several special Acts in which that Act might be incorporated, and not several powers given to the promoters of each special Act.

The 123rd section of the Lands Clauses Consolidation Act refers to the powers given by the Act for the purchase and taking of land; but not to the powers thereby given for carrying into effect a purchase already made.

**A** MOTION to restrain the Defendants from entering upon or taking possession of the pieces or parcels of land mentioned and required in a notice which the Company had served upon the Plaintiffs, and also in the defeasance to a bond which they had executed, (and which lands were part of the lands numbered 161 in the plan, referred to in the Company's Act); and from proceeding to take any measures to acquire the said land by compulsory purchase; or that they might be so restrained unless they should at the same time proceed to purchase the whole of the Plaintiffs' manufactory, and to make compensation to the Plaintiffs for all the damage to be sustained by them in consequence of the taking of such manufactory.

The land numbered 161 was the property of the Plaintiff *W. H. Sparrow*, and was occupied and used for the purposes of an iron and tin-plate manufactory, carried on by him in partnership with the other Plaintiff *W. M. Sparrow*. The land consisted in part of a private road running within the manufactory, and over which a person of the name of *Crane* had a right of way, under an agreement with the Plaintiff *W. H. Sparrow*; and it was alleged that the whole of the land was included in the manufactory.

The Company's Act, intituled "An Act to authorise an alteration of the line of the *Oxford, Worcester, and Wol-*

*verhampton* Railway, and for other purposes" (a), received the royal assent on the 14th of August, 1848. After

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(a) 11 & 12 Vict. cap. cxxxiii.  
Loc. & Pers.

The following sections are material:—

Sect. 2. "That the provisions of the said Lands Clauses Consolidation Act, (1845), and the said Railways Clauses Consolidation Act (1845) shall respectively, so far as the same are applicable, and are not inconsistent with the provisions hereinafter contained, be incorporated with and form part of this Act."

Sect. 12. "That the Company shall, and they are hereby required to, purchase the properties numbered respectively, in the parish of *Wolverhampton*, 90, 91, 130, 131, and 140, on the plans of the railway by this Act authorised to be made, deposited as hereinbefore mentioned, or such of the said properties as the persons to whom the same shall respectively belong shall require to be purchased: Provided always, that nothing herein contained shall prejudice or affect the compulsory powers for purchasing such properties by this Act conferred upon the said Company."

Sect. 13. "That such part of the railway by this Act authorised to be made as shall pass through any of the several plots, pieces, or parcels of land in the parish of *Wolverhampton*, numbered 159, 160, 161, and 162, on the said plan deposited &c., and so much of the piece of land

numbered 158 as is hereinafter defined, shall be arched or covered over; and the top or upper surface of the ground above such arching or covering over shall not exceed, at the north-western end of such part of the said railway, seventeen feet, nor, at the south-eastern end, twenty-two feet above the level of the rails of the said railway, as shewn upon the section deposited &c.; and the upper surface of the ground above such arching or covering shall be a regular incline in the direction of the line of the said railway; and such arching or covering shall commence at the centre of the south-eastern pier of the sixth arch of *The Birmingham, Wolverhampton, and Stour Valley Railway Viaduct* now erected, reckoning from the north-western end thereof, and shall be made square therewith; and such arching or covering shall be constructed in such manner and of such strength as shall make it sufficient to bear and carry over and upon the same a branch railway or branch railways, to be worked by horse power; and in case the owner or owners for the time being, and other parties interested in the said plots, pieces, or parcels of land, and the said Company shall differ as to the manner of constructing or as to the strength of such arching or covering, the same shall be settled by arbitration in manner prescribed by the

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the passing of the Act, the Plaintiffs erected upon part of the land various buildings for the purposes of their manufactory; and in this state of circumstances the Company, on the 25th of June, 1851, served the Plaintiffs with notice that the Railway would pass through the piece of land numbered 161, and that portions of the same, colored red, containing in the whole  $19\frac{1}{4}$  perches, were required by the Company for the purposes of the Railway, and thereby offered to contract for the purchase thereof in the usual way. The Plaintiff *W. H. Sparrow* met this notice by a counter notice to the Company, dated the 5th of July, 1851, in these terms: "I contend that I cannot be required to sell or convey to the promoters of the undertaking a part only of the said iron and tin-plate manufactory, and I decline to sell a part only. I am willing and able to sell and convey the whole thereof; and I claim in respect thereof and for compensation and damages the sum of 60,000*l.*, which sum includes the claim of the said Osier Bed Iron Company," the partnership above referred to; "but is exclusive of any claim of *Henry Crane* in re-

Railways Clauses Consolidation Act, 1845, with respect to the settlement of disputes by arbitration."

Sect. 14. "That the owner or owners for the time being of the said several plots, pieces, or parcels of land lastly hereinbefore mentioned, and all other persons interested therein, shall have and enjoy the same powers, rights, privileges, easements, and authorities over, above, and upon the upper surface of the said arching or covering, including the power of making, maintaining, and working the said branch railway or railways, to be worked by horse power as aforesaid, over and upon

the said arching or covering, as the said owner or owners, or other persons, now have and enjoy in, upon, and over the said several plots, pieces, or parcels of land respectively: Provided always, that the said owner or owners, or other persons, shall not be at liberty to erect upon the arching or covering any building without the consent of the Company, as therein mentioned."

Sect. 36. "That the powers of the Company for the compulsory purchase of lands for the purposes of this Act shall not be exercised after the expiration of three years from the passing of this Act."

spect of my grant to him, his heirs and assigns, of a right to use a certain road which forms part of such manufactory."

The Company, on the 6th of August, 1851, caused the portion of the land mentioned in their notice to be valued by a surveyor appointed by two justices of the peace, in pursuance of the provisions of the Lands Clauses Consolidation Act (a). The purchase money, according to such valuation, was 150*l.*, and the compensation for severance 350*l.*; and the Company thereupon paid 500*l.* into the Bank to the account of "Railway Accounts opened during the Chancery vacation;" and, on the 13th of August, they delivered to the Plaintiffs their bond with two sureties in the sum of 500*l.*, conditioned for the payment by the Company to the Plaintiffs of all such purchase-money and compensation as should be determined to be payable by the Railway Company for such land.

The powers of the Company for the compulsory purchase of land expired on the 14th of August, 1851.

The Company, upon the payment of the 500*l.* into the Bank and the execution of the bond, claimed the right to enter upon the portion of the land comprised in their notice and mentioned in the bond; but they had not actually entered when the bill was filed.

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The *Solicitor General* and Mr. *Shapter* for the motion.

*Argument.*

Mr. *Rolt* and Mr. *Bovill* for the Defendants.

On the effect of the termination of the period for the

(a) Sect. 85.

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exercise of the compulsory powers of the Company before they had entered on the land or perfected their title, *Brocklebank v. Whitehaven Junction Railway Company* (a), was cited on behalf of the Plaintiffs. The Defendants referred to *Walker v. Eastern Counties Railway Company* (b), and *Adams v. London and Blackwall Railway Company* (c), and the cases there cited on the effect of notice by the Company as a contract binding upon them. And they also cited *The Queen v. The Birmingham and Oxford Junction Railway Company* (d), *Doe d. Armistead v. The North Staffordshire Railway Company* (e), and *Worsley v. The South Devon Railway Company* (f).—On the question of the liability of the Company to purchase the whole of the manufactory, several cases were cited (g), to which it is not necessary to advert, as the decision of the Vice-Chancellor turned on the special terms of the Company's Act. [See, on this part of the case, the opinion expressed by the Lords Justices, *infra*, p. 448.]

*Nov. 18th.*

VICE-CHANCELLOR:—

*Judgment.*

In the view which I take of the case, it is not necessary for me to enter into the affidavits which have been filed upon the motion. It is sufficient to state, that, in my opinion, they establish sufficient ground for the interfer-

(a) 15 Sim. 632; *S. C.*, 5 Railw. Cas. 373, 379.

(b) 6 Hare, 594.

(c) 2 Mac. & G. 118.

(d) 19 L. J., Q. B., 453; *S. C.* in error.

(e) 20 L. J., Q. B., 249.

(f) 20 L. J., Q. B., 254.

(g) See, on this point, *The*

*Queen v. The London and South Western Railway Company*, 12 Q. B., 775; *Barker v. The North Staffordshire Railway Company*, 5 Railw. Cas. 401; and *The Queen v. The London and Greenwich Railway Company*, 2 Gale & Dav. 444.



ence of the Court, if the case were to be decided on the question of comparative injury.

This motion asks for the summary interference of the Court, to prevent the exercise of an alleged legal right, upon the ground that the right either does not exist, or is doubtful, and that irreparable injury will ensue by permitting it to be exercised. In such cases I think it is the duty of the Plaintiffs to satisfy the Court, that there are substantial grounds for doubting the existence of the legal right. If, on the one hand, the Court is satisfied that such grounds exist, it is bound to interfere for the protection of the property. If, on the other hand, it is satisfied that no such ground exists, it is not less bound to withhold its interference. However irreparable the injury to parties may be, this Court has no power or right to prevent it, if it be sanctioned by the law. I have felt it incumbent on me, therefore, to consider this case with reference to the legal right of the parties.

The Plaintiffs' case rests upon two points: first, that the Company have not now any right to take any part of these lands; and secondly, that, if they have the right to take any part of the lands, they are bound to take the whole of the Plaintiffs' manufactory.

The first point depends, I think, entirely upon the construction of The Lands Clauses Consolidation Act,—whether the Defendants' powers of entry and of purchase subsist after the expiration of the period prescribed for the compulsory purchase or taking of lands; and I think it clear that both these powers subsist, unless they are taken away by the 123rd section. The question, therefore, is reduced to this—Whether the 123rd section does or does not abrogate these powers? In determining this question, it is necessary, in the first place, to consider the frame of

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On a bill to restrain the exercise of a legal right, it is the duty of the Plaintiff to satisfy the Court that there are substantial grounds for doubting the existence of the legal right.

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the Act; and, upon examination, it will be found to stand thus: After some provisions relating to purchases by agreement, the Act proceeds to deal with the case of the purchase and taking of lands otherwise than by agreement; and sections 18 and 21 provide, that when the promoters require to purchase or take any of the lands, they shall give notice to the parties interested, and demand the particulars of their estate in the lands, and of their claims in respect thereof; and that, if the particulars be not furnished in twenty-one days, or if the parties do not agree as to the amount of compensation to be paid, the amount of such compensation shall be settled in manner after provided for settling cases of disputed compensation,—the enactment for such settlement being imperative. Sections 22 and 23 provide the manner of settling cases of disputed compensation:—if the claim be under 50*l.*, by justices; and if above 50*l.*, by arbitration at the election of the landowner, and otherwise by the verdict of a jury. Section 24 points out the course of proceeding before the justices in the cases of claims under 50*l.* Sections 25 to 37 relate to the course of proceeding before arbitrators where the claims are to be settled by arbitration, and they are imperative on the promoters as to the appointment of arbitrators and other matters connected with the arbitration. Sections 38 to 57 relate to the proceedings before a jury, where the claims are to be settled by jury, and are in like manner imperative on the promoters as to summoning the jury and other matters connected with those proceedings. Sections 58 to 67 point out the course to be pursued for ascertaining the compensation, where the landowner is prevented from treating by absence from the kingdom, or cannot be found. Section 68 provides the means of ascertaining the compensation, where the lands have been taken without satisfaction having been made. Sections 69 to 83 provide for the deposit of the purchase-money, (as to which the enactments are also

imperative), and for conveyance of the lands, giving power to the promoters, after deposit of the purchase-money, to vest the land in themselves by the execution of a deed poll, if the conveyance be not made or a good title adduced. Sections 84 to 91 relate to the entry upon and possession of the lands; the 85th section, under which the defendants are now proceeding, giving power to the promoters to enter, on deposit in the Bank of the value claimed by the landowner or ascertained by a surveyor, and giving a bond with two sureties for the same amount, conditioned for payment of the purchase-money or compensation to be ascertained in manner before provided; and section 91 giving power to the promoters to issue their warrant to the sheriff to deliver possession, where the landowner refuses to give it up. These sections are followed by several others having relation to particular cases, not material to the present question; and we then come to the 123rd section (a), which fixes the period for the termination of the compulsory powers.

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It appears, therefore, that this clause is preceded by clauses which relate in succession, first, to the purchase; secondly, to the ascertainment of the price to be paid; thirdly, to the payment of the price; fourthly, to the conveyance or vesting of the land in the promoters; and fifthly, to giving the promoters the possession: and it is to be observed, that these clauses, so far as they are for the benefit of the landowner, are imperative upon the promoters. By the 18th section, when they require to purchase or take

(a) Sect. 123 "And be it enacted, that the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the special Act shall not be exer-

cised after the expiration of the prescribed period, and, if no period be prescribed, not after the expiration of three years from the passing of the special Act."

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the land they are to give the notice, leaving it to their discretion whether they give the notice or not; but by the 21st section, when they have given the notice, and no agreement is made, the enactment is imperative, that the compensation shall be settled in manner after provided; and the provisions for the settlement and payment of it are equally imperative. Independently indeed of the language of the Act, the cases which have been decided upon it, leave no doubt of the imperative obligation upon the promoters; for they have decided, that the notice creates the relation of vendor and purchaser, and that the promoters cannot recede from it after it has been given. After the notice has been given, the promoters are compellable to ascertain and pay the price; and it does not appear to be a very reasonable construction of the 123rd section, to hold that it utterly destroys their power to acquire the property for which they have been or may be compelled to pay. Of course, however, if this be the only construction which can be put upon the clause, Courts of law and equity must be bound by it, however unreasonable it may be. It is to be seen, therefore, whether this is the only, and therefore the necessary, construction of the clause; and, upon examination, I think it will be found that it is not.

The clause is, that the powers of the promoters for the compulsory purchase or taking of lands for the purposes of the special Act, shall not be exercised after the expiration of the prescribed period; and the first question appears to me to be, whether the powers intended to be here referred to, are powers given to the several promoters of the several special Acts, or several powers given to the promoters of each special Act. Now this Act was passed for the purpose of being incorporated in different special Acts; and the promoters in this clause, and throughout the Act, are spoken of in the aggregate; and I think, therefore, the legislature

may well be understood to have referred, and did in fact refer, in this clause to powers given to several sets of promoters, and not to several powers given to one set of promoters; and if this be, as I think it is, the true meaning of the clause, we are at once relieved from the difficulty of the clause having referred to several powers, when there was no power given to the promoters beyond the powers of purchasing, except the powers of summoning juries and of entry, and so on.

This construction, however, does not remove the whole difficulty of the case. We have still to consider what are the powers of purchasing or taking to which the clause refers. It is evident, I think, that it refers to the powers which are to be found under the head of the purchase and taking of lands otherwise than by agreement. Does it then refer to all the powers which are to be found under that head. I am of opinion, that it cannot be held to do so. It refers to powers for purchase and taking only; and both the language of the Act imports, and the decided cases settle, that, when the notice is given, a purchase is made. The other powers to be found under this head are not in the ordinary sense powers of purchase: they are powers given for the purpose of carrying into effect a purchase already made, and are so treated by the Act.

In the argument upon this point of the case, much reliance was placed upon the word "taking" which is found in this clause; but I think the insertion of that word gives no additional weight to the Plaintiffs' case. The words "purchase or take" are used in the 18th clause; and the clauses 58 to 67 refer to lands which may well be said to be taken, but can hardly be said to be purchased.

Upon the whole, my opinion is, that, the Defendants having served the notice, deposited the money, and given the bond before the expiration of the prescribed period, nei-

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Powers under the head of the purchase and taking of lands distinguished into those strictly for that purpose, and those which are powers for carrying into effect a purchase already made.

The clauses 58 to 67 of the Lands Clauses Consolidation Act refer to lands which may more properly be said to be taken than purchased.

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ther their power to purchase nor their power to enter is gone by the expiration of that period; and that there is not, upon the construction of the Act, any such reasonable doubt upon that question as should induce the Court to grant this injunction.

This opinion, however, is at variance with the decision of the late Vice-Chancellor of *England* in the case of *Brocklebank v. Whitehaven Junction Railway Company* (a); and it would undoubtedly be great presumption on my part to refuse this injunction in the face of that decision, if it had remained unimpeached; but that decision was dissented from by Lord *Cottenham* in very decided terms; and since his opinion was expressed upon it, two cases have occurred at law: in one of which it was held, that, where the Company had given the notice within the prescribed period, they were bound at the instance of the landowner to summon a jury for ascertaining the price after the expiration of that period; and in the other of which it was held, that, where the Company had taken possession under the 85th section of the Act before the expiration of the prescribed period, they were entitled to retain it after that period expired; and in this latter case, a very decided opinion was expressed by the Court of Queen's Bench against the decision in *Brocklebank's case*. I think, therefore, that I should not be justified in giving to that case the weight to which it would otherwise be entitled; and I think so the more strongly, because the last case at law to which I have referred seems to me to go the whole length of the present case: the Company, in that case, having been held to be entitled to retain the possession, must surely have been entitled to perfect their title under their compulsory powers; and if the compulsory powers continued in that case to exist, I can see no possible reason why they should not exist in the present.

Where a Railway Company are entitled to retain the possession of lands which they have taken, they must also be entitled under their compulsory powers to perfect their title.

I must refuse this injunction, therefore, upon the first point.

The second point urged in support of the motion was, that the Company are bound to take the whole of the manufactory; and this point depends upon different considerations. The Plaintiffs contend, that, by the 92nd clause of the Lands Clauses Consolidation Act (a), the Defendants are bound to take the whole manufactory. Some question was raised as to the pieces or parcels of land which in truth form part of the manufactory; but I think it unnecessary to decide that point, and I give no opinion upon it.

My opinion is, that the 92nd clause of the Lands Clauses Consolidation Act is not incorporated in the special Act. The special Act incorporates the provisions of the Lands Clauses Consolidation Act only so far as they are applicable to and consistent with the provisions in the special Act after contained; and I think the 92nd section is neither applicable to nor consistent with those provisions. By those provisions, which are contained in sections 13 and 14 of the special Act, the part of the Railway passing through No. 161 is to be arched over, and the arching is to be of sufficient strength to bear a railway to be worked by horse-power; and, in case the owners and the Company differ as to this, it is to be settled by arbitration; and the owner for the time being of 161 is to have the same power over the upper surface of the archway, including the power of working the railway by horse-power, as he now has over the land. Now, if the 92nd clause be held to apply, the Company must become

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WORCESTER,  
AND WOLVER-  
HAMPTON  
RAILWAY Co.  
Judgment.

(a) Sect. 92. "And be it enacted, that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house, or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

1851.  
 SPANROW  
 v.  
 THE OXFORD,  
 WORCESTER,  
 AND WOLVER-  
 HAMPTON  
 RAILWAY Co.  
*Judgment.*

purchasers of the manufactory; and it cannot I think be said, that the Plaintiffs would, in that case, have the same power over the upper surface of the archway as they now have over the land—the power, for instance, of using it for the purposes of their manufactory. Nor do I see how there could be any such owner or owners for the time being, as the Act refers to (a). I think therefore the Plaintiffs' case fails as to this point also; and that the motion must be refused, but certainly without costs.

*Lords Jus-  
 tices.  
 Dec. 15th.*

*Order.*

Form of order,  
 by consent, for  
 hearing a cause  
 upon affidavits.

THEIR LORDSHIPS do order that the Plaintiffs be at liberty to amend their bill as they might be advised; but the amendment is to be made before Monday the 29th of December, instant. And the Plaintiffs waiving any answer from the Defendants, by consent it is ordered that this cause be heard as if an answer had been filed and replied to; and by the like consent, all the affidavits already filed, and any further affidavits to be filed by both or either of the parties within a week from the said 29th of December, are to be read as evidence on the hearing; and no affidavit is to be used unless filed within that period: such further affidavits to relate only to the matters raised upon the pleadings; and each party to file such further affidavits without seeing the affidavits of the opposite party. And it is ordered, that copies of the deposited plans and book of reference of the line authorised by the "The Oxford &c. Act, 1840," be made and verified for use on the hearing; and, by the like consent, that arrangement is to be without prejudice to the right of either party to appeal on the merits. And by permission of this Court the cause is to be heard before the Lords Justices of Appeal on the first

(a) Upon this point the Lords Justices expressed an opinion, that it was possible the provision as to the use of the archway by the owner of the manufactory might have been in contemplation of such owner retaining all that part of the manufactory which was not required by the Company, owing to his being either not able or not willing to sell and convey the whole; and their Lordships, not being satis-

fied that the land proposed to be taken was not part of the manufactory, granted the injunction, but expressed no doubt of the construction of the Lands Clauses Consolidation Act, adopted in the above judgment. On the hearing, May 4th, 1852, their Lordships pronounced their judgment in favour of the Plaintiffs, on the applicability of the 92nd section, by incorporation in the special Act.



day of hearing appeal cases before their Lordships after the 30th day of December instant. And in the meantime it is ordered, that the Defendants, and their agents, servants, and workmen be restrained by the order and injunction of this Court from entering upon or taking possession, &c., and from proceeding to take any measures to acquire &c., unless the Defendants at the same time proceed to purchase the whole of the Plaintiffs' manufactory in &c., and to make compensation to the Plaintiffs for all damage to be sustained by them in consequence of the taking of the said manufactory.

1851.

SPARROW  
v.  
THE OXFORD,  
WORCESTER,  
AND WOLVER-  
HAMPTON  
RAILWAY CO.

Order.

## HEWITT v. LOOSEMORE.

THE bill was brought by the equitable mortgagee by deposit of a lease against a subsequent assignee of the lease and the premises comprised therein, and also against the assignees in bankruptcy of the mortgagor. The bill prayed a declaration that the Plaintiff was entitled in priority over such assignee of the lease; that an account might be taken of what was due to the Plaintiff in respect of his mortgage; and that the assignee of the lease and the assignees of the mortgagor might pay such amount, or be foreclosed, and might deliver possession of the premises and title deeds to the Plaintiff.

*Robert Loosemore*, the lessee, was a solicitor; and on the 15th of April, 1834, he deposited the lease with the Plaintiff for securing the sum of 1706*l.*, and signed and delivered to the Plaintiff a memorandum that it was deposited for that purpose. Afterwards, and on the 17th of November, 1838, he assigned the lease to the Defendant *John Loosemore*, by way of mortgage, for securing the sum of 300*l.*

Nov. 18th &  
19th.

Dec. 2nd.

A legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title deeds, unless there be fraud, or gross or wilful negligence on his part; and the Court will not impute fraud, or gross or wilful negligence to the legal mortgagee, if he has bona fide inquired for the deeds, and a reasonable excuse has been given for not delivering them to him; but the Court will impute fraud, or gross or wilful negligence to the mortgagee, if he

omits all inquiry as to the deeds.

Where a mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction, although the mortgagor, acting as such solicitor, is not paid by the mortgagee; for the nature of the transaction is, that all expenses are borne by the mortgagor.

It does not necessarily follow in such a case, because the mortgagor is the solicitor of the mortgagee, that, therefore, the mortgagee has constructive notice of facts connected with the title which are known to the mortgagor.

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v.  
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—  
*Statement.*

The bill charged that *John Loosemore*, before the date of the assignment of the premises to him, or the payment of any money whatever, had notice of the charge in favour of the Plaintiff, and that the same had not been satisfied; and that, upon the occasion of *John Loosemore's* taking the said assignment of the premises, he did not use due caution or diligence in inquiring into the title of *Robert Loosemore* thereto; and that, previously to that time, he had notice that *Robert Loosemore* was in embarrassed circumstances, and had parted with his title deeds; that no deed, lease, or other document, relating to the said premises, was ever produced or shewn by *Robert Loosemore* to *John Loosemore*; that *John Loosemore* ought to have required from *Robert Loosemore* the production and inspection of the said lease; and that, if he had done so, he would have discovered the charge in favour of Plaintiff; and that, having neglected to take such precautions as aforesaid, he was guilty of gross negligence and want of caution, and was not entitled to have the benefit of his said assignment as against the Plaintiff.

The bill also charged that *Robert Loosemore* was the solicitor of *John Loosemore*, and acted as such in the transactions relating to the assignment; and that *John Loosemore* must be taken to have had notice of every thing connected with the premises which was in the knowledge of *Robert Loosemore*, and ought for this reason to be in the same position as if he had had actual notice of the said charge and deposit in favour of the Plaintiff; and that, besides this, he in fact had actual notice thereof; and the bill charged that, under the circumstances, the Plaintiff was entitled to priority over *John Loosemore*, on the ground both of constructive and of actual notice; and that, if the Plaintiff was not entitled to such priority in respect of his said charge and deposit, at all events he was entitled to redeem the premises on payment to *John Loosemore* of what (if

anything) should be found due to him upon his alleged security of the 17th of November, 1838.

The Defendant, in a passage in his answer, which was read in evidence against him, said, that, in or about October, 1838, he was possessed of 300*l.*, which he was desirous of investing upon mortgage or other sufficient security, at interest, and accordingly applied to *Robert Loosemore*, who had for many years carried on an extensive business as an attorney at *Tiverton*, to know if he had any client desirous of borrowing that sum upon a security which he (*Robert Loosemore*) could recommend; when *Robert Loosemore* replied, that he had not then any client who wanted such a sum, but that, if he should hear of such a security as Defendant required, he would inform Defendant of it. The Defendant then stated the assignment to him of the 17th of November, 1848. And in other passages in his answer, which were also read in evidence against him, the Defendant stated, that at the time when the said assignment was executed by *Robert Loosemore*, and delivered to the Defendant, and at the time when the Defendant paid to *Robert Loosemore* the said sum of 300*l.*, or at any time before, Defendant had no notice whatever of the alleged memorandum of the 15th of April, 1834, or that the indenture of lease had been deposited by *Robert Loosemore* in the hands of the Plaintiff; and the Defendant said, that he was a farmer, and unacquainted with legal forms; but, upon the said indenture of assignment being handed to him as aforesaid, he inquired of *Robert Loosemore* whether the lease of the premises ought not to be delivered to him as well; when *Robert Loosemore* replied, that it should, but that, as he was rather busy then, he would look for it and give it to the Defendant, when he next came to market. The Defendant admitted, that, under the circumstances stated by his answer, no deed, lease, or other document relating to the premises, except the assign-

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*Statement.*

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ment to him (the Defendant) was ever produced or shewn by *Robert Loosemore* to the Defendant.

The Defendant said, that he had employed no solicitor in or about the said transaction between the Defendant and *Robert Loosemore*; and that *Robert Loosemore* prepared the indenture of assignment at his own costs and charges, and that his (*Robert Loosemore's*) clerk attested the execution thereof.

Argument.

Mr. *Rolt* and Mr. *Giffard* for the Plaintiff.

1. The Defendant had constructive notice of the deposit of the lease with the Plaintiff. The Defendant employed *Loosemore*, the mortgagor, as his solicitor in taking his mortgage. The Defendant did not prepare the assignment himself, it was prepared by the mortgagor, and the Defendant employed no other solicitor or professional adviser; and the necessary conclusion is, that *Loosemore*, the mortgagor, was his solicitor in the transaction; and that the Defendant is affected with notice of the prior deposit which was known to the mortgagor: *Le Neve v. Le Neve* (a), *Sheldon v. Cox* (b).

2. If the Defendant had required the production of the lease, as he ought to have done, he would have discovered that it had been deposited with the Plaintiff; and the lessee would have been then unable to defeat or displace the Plaintiff's security; and the Court will hold a party to have constructive notice of every fact to which a proper pursuit of the information which he had would have led him. The protection which the Court gives to a party in possession is founded on an application of this principle, that knowledge of such possession is notice of the title of

(a) 3 Atk. 646.

(b) 2 Eden, 224; *S. C.*, Amb. 624.

the occupant. Knowledge, or ground to suspect, that the mortgagor is not in possession of the very instrument which he proposes to assign is, in like manner, sufficient notice of the possible existence of an adverse title in some other person; and a party having such notice cannot disregard such adverse title: *Dryden v. Frost* (a), *Jackson v. Rowe* (b), *Neesom v. Clarkson* (c).

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3. If the Defendant had not constructive notice, he is chargeable with gross and wilful negligence in not requiring the production of the very lease of which he purported to take an assignment: such negligence is tantamount to fraud, and is a sufficient ground for postponing the Defendant's security to that of the Plaintiff: *Worthington v. Morgan* (d), *Tylee v. Webb* (e).

The *Solicitor-General* and Mr. *Speed*, for the Defendant, contended—First, that the mortgagor was not the solicitor of the Defendant in the business of the mortgage; the Defendant did not pay and was not liable to pay for the preparation of the assignment. Secondly.—If *Loosemore* were the solicitor of the Defendant, constructive notice would not be imputed, for the existence of the prior mortgage was a fact which he would certainly have concealed: *Kennedy v. Green* (f). Thirdly.—The case of constructive notice on other grounds did not arise, unless at least the Defendant had omitted to make any inquiry for the lease. Having inquired, and received an answer to the effect that the lease would be delivered to him, he was justified in relying upon that promise: *Evans v. Bicknell* (g), *Jones v. Smith* (h), *Allen v. Knight* (i), *Plumb v. Fluit* (k), *Barnett*

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|------------------------------------|-----------------------------------|
| (a) 3 My. & Cr. 670.               | (f) 3 My. & K. 699.               |
| (b) 2 S. & S. 472.                 | (g) 6 Ves. 174.                   |
| (c) 2 Hare, 173—Per Sir J. Wigram. | (h) 1 Hare, 43; S. C., 1 Ph. 244. |
| (d) 16 Sim. 547.                   | (i) 5 Hare, 272.                  |
| (e) 6 Beav. 552.                   | (k) 2 Anst. 432.                  |

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*Argument.*

v. *Weston* (a), *Martinez v. Cooper* (b), *Ex parte Meux* (c),  
*Farrow v. Rees* (d).

Mr. Rolt, in reply.—In *Kennedy v. Green* it was held, that the party who had committed a fraud was not to be deemed to have communicated it. The distinction was between imputing constructive notice of a mere fact—a charge on the property—and notice of a fraud in acquiring the property. He relied on *Jackson v. Rowe*, *Tylce v. Webb*, *Dryden v. Frost*, and *Worthington v. Morgan*, as establishing that a gross want of caution was sufficient to postpone a mortgagee or purchaser, even if distinct fraud could not be imputed to him.

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The VICE-CHANCELLOR:—

*Judgment.*  
 —

The question in this case is, whether an equitable mortgagee by deposit of a lease, is entitled to priority over another mortgagee to whom the legal interest in the lease has been subsequently assigned.

[His Honor stated the facts not in dispute, the above charges from the bill, and the admissions read from the answer.]

Two points were argued at the bar:—First, that *Robert Loosemore* must be taken to have acted as the solicitor of the Defendant in the transaction of his mortgage; and that the Defendant therefore had notice through him of the lease having been deposited with the Plaintiff: and secondly, that the Defendant, having taken the legal mort-

(a) 12 Ves. 130.  
 (b) 2 Russ. 198.

(c) 1 G. & J. 116.  
 (d) 4 Beav. 18.

gage without the lease, or any further inquiry respecting it than appeared by the answer, the Plaintiff's equitable title by deposit ought to prevail against the Defendant's legal interest—the non-delivery of the lease to the Defendant, and the absence of further inquiry respecting it, constituting a sufficient case of constructive notice.

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 Judgment.

As to the first point, I think that where a mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction of the mortgage. The mortgagee in such cases trusts the mortgagor to discharge those duties which his own solicitor would discharge, if he thought proper to employ one; and it can make no difference—that the mortgagor is not paid by the mortgagee—the very nature of the transaction being, that all the expenses are borne by the mortgagor. I am of opinion, therefore, that *Robert Loosemore* must be considered to have been the agent and solicitor of the Defendant in the transaction of his mortgage; but I do not think that the Defendant is therefore to be considered to have had notice of the Plaintiff's deposit; such notice would be constructive merely, and constructive notice is knowledge which the Court imputes to a party upon a presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated; and I cannot act upon such a presumption in the face of the evidence which the Plaintiff has himself adduced.

In determining this point in favour of the Defendant, I desire it to be understood, that I do not proceed upon the case of *Kennedy v. Green* (a). The well founded and wholesome limitation upon the doctrine of constructive notice

(a) 3 My. & K. 699.

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 —  
*Judgment.*

established by that case, does not appear to me to apply to the present. There was here no fraud in the original deposit with the Plaintiff, and no fraud in the mortgage to the Defendant, if the fact of the deposit with the Plaintiff was communicated; and it would, I think, be a misapplication of the case of *Kennedy v. Green*, to hold that the fact of the deposit must be taken not to have been communicated, because it was a fraud to conceal it. So to apply the case would be, in trying the question whether there was knowledge or not, to assume that there was fraud.

The first point being thus disposed of, I proceed to consider the second, which is one of great general importance—whether an equitable mortgagee by deposit of title deeds is entitled to priority over a subsequent legal mortgagee of the property comprised in the deeds, who has not made all the inquiries after the deeds which could or might have been made.

It is first to be considered how this question stands upon the authorities; for if there be a settled rule of the Court upon the subject, I certainly cannot venture to alter it; nor should I be disposed to do so, as I am fully satisfied that the advantage derived from adhering to settled rules of law greatly overbalances any mischief with which the adherence to such rules may be attended in individual cases.

Without reference to the authorities anterior to the case of *Plumb v. Flutt* (a), many of which, and particularly the later ones are favourable to the doctrine there laid down, it was in that case held that nothing but fraud or gross and voluntary negligence in leaving the title deeds, will oust the priority of a legal mortgagee; and that where the legal mortgagee had applied for the deeds, and had relied

(a) 2 Anst. 432.



upon the promise of the mortgagor that he would send them, it was not such fraud or gross and voluntary negligence as would postpone him to a prior equitable mortgagee. The doctrine thus laid down was re-asserted by Lord *Eldon* in *Evans v. Bicknell* (a), and again in *Martinez v. Cooper* (b). It was recognised by Sir *William Grant* in *Barnett v. Weston* (c), and by Sir *John Leach* in *Harper v. Faulder* (d); and it was also affirmed by Lord *Langdale* in *Farrow v. Rees* (e), and by Lord *Cottenham* in *Allen v. Knight* (f); and I must take it therefore to be the doctrine of the Court, unless there are other authorities to contradict it.

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Judgment.

It was said in the argument upon the present case, that the cases to which I have referred could not be reconciled with the decision in *Jackson v. Rowe* (g), with what fell from Lord *Cottenham* in *Dryden v. Frost* (h), and from Lord *Langdale* in *Tylee v. Webb* (i), and with the determination of the late Vice-Chancellor of *England* in *Worthington v. Morgan* (j). But upon examining those cases, I do not think they will be found to be inconsistent with *Plumb v. Fluit*. In *Jackson v. Rowe*, the question was not, whether a prior equitable title could prevail against a subsequent legal one, but whether there was a good equitable defence against a prior legal title; and it did not appear that any inquiry whatever had been made about the title deeds. In *Dryden v. Frost*, though the facts of the case do not appear from the report, I think from Lord *Cottenham's* reference to the case of *Hiern v. Mill* (k), it must have appeared that *Frost*, the mortgagee, had notice that the deeds were in the hands of *Dryden*; in which case, both according to *Hiern v. Mill*, and *Birch v. Ellames* (l), and with reference

(a) 6 Ves. 174.

(b) 2 Russ. 198.

(c) 12 Ves. 130.

(d) 4 Madd. 129.

(e) 4 Beav. 18.

(f) On appeal, 9th June, 1847.

(g) 2 S. & S. 472.

(h) 3 My. & Cr. 670.

(i) 6 Beav. 552.

(j) 16 Sim. 547.

(k) 13 Ves. 114.

(l) 2 Anst. 427.

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 {  
 HEWITT  
 v.  
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 —  
*Judgment.*

to the doctrine of the Court as to estates in the possession of tenants, he was bound to make further inquiry. In *Tylce v. Webb*, there was no question as to the legal estate. Both the Plaintiff and *Hinton*, as to whom Lord *Langdale's* observation was made, were mere equitable mortgagees by deposit; and in *Worthington v. Morgan*, there had been no inquiry whatever as to the title deeds.

The law, therefore, as I collect it from the authorities, stands thus:—That a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title deeds, unless there be fraud or gross and wilful negligence on his part. That the Court will not impute fraud, or gross or wilful negligence to the mortgagee, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but that the Court will impute fraud, or gross and wilful negligence, to the mortgagee if he omits all inquiry as to the deeds. And I think there is much principle both in the rule and the distinctions upon it.

When this Court is called upon to postpone a legal mortgagee, its powers are invoked to take away a legal right; and I see no ground which can justify it in doing so except fraud, or gross and wilful negligence, which, in the eye of this Court, amounts to fraud; and I think that in transactions of sale and mortgage of estates, if there be no inquiry as to the title-deeds, which constitute the sole evidence of the title to such property, the Court is justified in assuming that the purchaser or mortgagee has abstained from making the inquiry, from a suspicion that his title would be affected if it was made, and is therefore bound to impute to him the knowledge which the inquiry, if made, would have imparted. But I think, that where *bonâ fide* inquiry is made, and a reasonable excuse given, there is no ground for imputing the suspicion, or the notice which is consequent upon it.

Applying these principles to the present case, I am of opinion that the Plaintiff has failed in making out a sufficient case for postponing the Defendant, and that the only decree which I can make is the usual decree for redemption; but the Plaintiff must pay the costs up to and including the decree. The charge in the bill, that the Plaintiff is in any event entitled to redeem, seems to me to take this case out of the range of Lord *Eldon's* observations in *Martinez v. Cooper*.

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 v.  
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 Judgment.

IN THE MATTER OF MAHON'S TRUST.

1852.  
 Feb. 27th.

AN affidavit, in support of the petition in this matter, was sworn before a Master Extraordinary of the Court of Chancery of *Ireland*; but there was no evidence to authenticate the signature of the Master. This being the first case since the passing of the Evidence Act (a), in which an affidavit, sworn out of the jurisdiction of the Court, had been tendered without the authentication of the official character of the person before whom it was sworn, the Clerk of Affidavits desired that the case might be mentioned to the Court.

An affidavit, purporting to be sworn before a Master Extraordinary of the Court of Chancery in Ireland, is, under the stat. 14 & 15 Vict. c. 99, s. 10, admissible in evidence in a matter before this Court, without proof of the signature or official character of the person before whom it is stated to have been sworn.

Mr. *Hare* for the petitioner.

The VICE-CHANCELLOR said, the case appeared to be within the 10th sect. of the statute 14 & 15 Vict. c. 99, which makes documents admissible in evidence in *Ireland* admissible also in *England*.

(a) 14 & 15 Vict. c. 99.

1852.

Feb. 23rd.

## SWANN v. WORTLEY.

The stat. 14 & 15 Vict. c. 99, enabling parties to a cause to be examined as witnesses, renders unnecessary the common order under the old practice, giving liberty to a party to examine another party, saving just exceptions.

**MR. P. LE NEVE FOSTER**, for the Defendant *Robert Wortley*, moved for the four-day order, that *John Wortley*, another Defendant in the same cause, might attend and be examined as a witness in the cause, in obedience to the subpoena which had been served upon him.

The Defendant *John Wortley* having been called as a witness for his Co-defendant, since the Evidence Act (14 & 15 Vict. c. 99,) the order formerly required, giving liberty to examine the Defendant as a witness, had not been obtained.

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The *Vice-Chancellor* suggested, that, before applying the process of contempt, it might be prudent to obtain the usual order for liberty to examine the Defendant. But on the case being subsequently mentioned, and it being stated that the Master of the Rolls had, since the Evidence Act had come into operation, directed that the issue of the common orders for liberty to examine Co-defendants should be discontinued—

The *VICE-CHANCELLOR* said, it had occurred to him that the terms of the common order, "saving just exceptions," might be material, notwithstanding the Act; but, on consideration of the point, he was of opinion, that, since the Statute, these words were no longer necessary, and there was no reason for requiring the order.

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The four-day order was therefore made.

1852.

FORBES v. FORBES.

March 28th.

**MR. ANDERSON** and **Mr. A. J. Lewis** moved for a commission for the examination of the Plaintiff as a witness de bene esse, she being above 70 years of age, and in Scotland.

**Mr. Rolt** and **Mr. Beales** for the Defendant, who was also Plaintiff in a cross cause, asked that it might be made a term in the order, that the Plaintiff who now applied should put in her answer either first or contemporaneously in the cross cause in which she was Defendant. The bill was filed on the 29th of November, 1851, and this Defendant had obtained several orders for time to answer. If the reason of the danger of losing her evidence from her age was a sufficient ground for the application, according to the practice of the Court, it was equally a ground for giving the Plaintiff in the cross cause the benefit of her discovery at the earliest moment. The examination of the parties themselves was a new proceeding under the recent statute (a); and the Court in adapting its forms to the new practice, would follow out its fundamental principles, one of which was that he who came for equity must do equity.

On the application for a commission for the examination de bene esse of a witness above seventy years of age (such witness being the Plaintiff in the cause and a Defendant in a cross cause, whose time for answering had expired, and whose answer had not been put in, and being also the party who applied for the commission for the purpose of being examined in support of his own case, under the stat. 14 & 15 Vict. c. 99), the Court refused to impose it as a condition in making the order that the answer should be filed.

VICE-CHANCELLOR:—

The motion is of course. I cannot impose upon the party who applies for the order such a condition as is asked. The statute which has come into operation was not intended to alter the practice of the Court. I do not see any ground for distinguishing this case from that of any other in which an aged witness is to be examined.

*Judgment.*

Order made.

(a) 14 & 15 Vict. c. 99.

1852.

Jan. 22nd.

## CROSSE v. LAWRENCE.

On a contract for the sale of lands, described as partly freehold and partly copyhold, and the timber thereupon (the latter at a specified valuation), upon a condition that the vendor should not be required to distinguish the freehold land from the copyhold, nor the respective boundaries thereof, it was held, that, upon the particulars and conditions, the contract for the land and timber was one contract, and not separate contracts; and that the purchaser was bound to pay for the timber at the valuation, notwithstanding the fact that it might be wholly upon the copyhold land, and therefore subject to the rights of the lord, and the restrictions of the custom.

A CLAIM by a vendor, for the specific performance of a contract for the purchase of an estate called "Cwm Farm," described on the Particulars of Sale as comprising "113A. 1R. 36P., more or less, of arable, pasture, and meadow land, lying nearly within a ring fence, part freehold and part copyhold of inheritance of the Manor of *Leswery*, the copyhold parts whereof cannot be distinguished from the freehold." A note at the foot of the Particulars was in these words:—"The timber trees and saplings and underwood of seven years' growth on the respective lots, which are to be paid for by the purchasers, have been carefully valued by Mr. *Morris*, land-surveyor of *Newport*, for the purposes of this sale, and the amount upon each lot will be declared at the time of sale, and will be required to be paid on the completion of the purchases, in addition to the purchase money for the lots. The purchasers will also be required to take and pay for, at a valuation to be made by two referees or their umpire, in the usual manner, all the hay and straw crops, ploughings, labour, fallows, dressings, seeds, and manure, according to the custom of the country as between incoming and outgoing tenants." The property was offered for sale by auction, and the seventh condition of sale contained this provision:—"As to such of the lots as are stated in the Particulars to be partly freehold and partly copyhold, the purchasers thereof shall not be entitled to have it shewn how much of such lots respectively are freehold and how much copyhold, nor to have the free-

Where, upon a contract for the sale of an estate, a separate and distinct contract is made for the sale of the timber upon it, the Court will not enforce the latter contract unless the vendor can give the purchaser such possession and dominion over the timber as will entitle him to fell and remove it; but, if an entire contract be made for the sale, both of the estate and the timber (notwithstanding the purchase-money is made up of distinct sums for each), the vendor is only bound to make out his title to the land according to the contract; and the title to the land is the title to the timber upon it.

hold and copyhold parts respectively identified and distinguished, or the boundaries thereof respectively ascertained; nor to make any inquiry into or concerning the same."

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CROSSER  
v.  
LAWRENCE.  
Statement.

The Defendant became the purchaser of Lot 2, by private contract, at the price of 3000*l.*, and the further sum of 263*l.* 1*s.*, the amount of the valuation, and signed a memorandum to that effect, whereby he agreed to complete the purchase in all respects according to the particulars and conditions of sale. In the memorandum the price was thus stated:—

	£	s.	d.
"Purchase money . . . . .	3000	0	0
Valuation of timber, &c. . . . .	263	1	0
	<hr/>		
	3263	1	0
Deposit . . . . .	326	0	0
	<hr/>		
Balance . . . . .	2937	1	0."

The Defendant subsequently objected to pay for so much of the timber as could not be shewn to stand on the freehold portion of the farm, on the ground that he would not be entitled to fell the timber on the copyhold land. By an affidavit, the Defendant stated that he had purchased the land with the intention of building villas or houses thereupon.

Mr. *Russell* and Mr. *W. D. Lewis*, for the Plaintiff, relied on the stipulation in the contract by which the vendor had guarded himself from being called upon to distinguish the freehold from the copyhold land; and contended, that it was unreasonable for the purchaser, because such boundary could not be defined, to claim the timber without paying for it. The existence of the timber, even on the copyhold land, might increase the value of the estate. The

Argument.

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 }  
 CROSSLAND  
 v.  
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 —  
*Argument.*

purchaser could not claim a diminution of the price which he had agreed to pay on the ground of the tenure, when the tenure was in fact that which it was described to be. If he purchased land as copyhold, he could not claim compensation because there was a fine on alienation; nor, if as leasehold, because it was not freehold. The contract was single and entire, and one part of the contract could not be severed from the other.

The *Solicitor-General* and Mr. *W. M. James*, for the purchaser, contended, that, before he was bound to pay for the timber, it must at least be shewn that he could get it. The price to be paid for the land was one thing, and the price for the timber was another. The purchaser was precluded from objecting to the title to the land for the absence of distinction between the freehold and copyhold; but there was no such condition as to the timber. The stipulation, that payment should be made for the crops as between an incoming and an outgoing tenant, certainly ought not to bind the purchaser to pay for the crops unless he could have them; and if there were any prior title to the crops, he could be released from that obligation, without reference to any liability he might be under to take the land. It did not necessarily follow from this argument that the purchaser would not be bound to pay anything for the timber: it might be valued as standing timber, or the full value might be divided, and half attributed to the freehold and half to the copyhold. The objection was to the claim of the vendor to the full value of the whole.

Some argument was directed and some affidavits filed, and cases cited (a), on the point of the right of the copyholder to the timber as between himself and the lord; but the judgment did not turn on this point.

(a) *Ashmead v. Ranger*, 1 Ld. worthy, 4 M. & Selw. 339; *Lewis v. Branthwaite*, 2 B. & Ad. 437.  
*Raym.* 551; *Whitechurch v. Hol-*



VICE-CHANCELLOR:—

The question in this case appears to me principally, if not wholly, to depend upon the point of whether the contract for the purchase of the timber and the purchase of the land are to be considered as separate and distinct contracts, or as constituting together one contract; for, undoubtedly, if the contract for the purchase of the timber is to be considered as a separate and distinct contract, it would be incumbent upon the vendor to prove either that there was a custom of the manor entitling the vendor to cut timber, or that it was a case in which a grant of a right to cut timber might be presumed in favour of the tenant.

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 CROSS  
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 Judgment.

It was argued on behalf of the purchaser, that the contract for the timber and the contract for the land are to be considered as separate and distinct contracts. This argument was founded on the terms of the stipulation with regard to the timber, and the words "in addition to the purchase-money for the lots," contained in this stipulation, were adduced as constituting a separate and distinct contract for the purchase of the timber. But it is to be observed, that that stipulation speaks of the valuation of the timber having been made "for the purposes of this sale." Now the purposes of the sale were clearly not for the sale of the timber, but for the sale of the estate; and, therefore, that stipulation itself connects the sale of the timber with the sale of the estate. But further than this, the 3rd condition of sale seems to me to import the value of the timber into the purchase-money for the estate, for it provides for the payment of the deposit and of the remainder of the purchase-money, including the value of the timber. The 4th condition also incorporates the purchase of the estate and the timber together, by stipulating that the interest shall be paid on the purchase and timber money remaining unpaid. The 9th condition is to the

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 }  
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 —  
*Judgment.*

same effect (a), for it makes no distinction between the assurances of the timber and the assurances of the estate, but deals with them as one complete and entire subject of one entire contract. And there are, moreover, no stipulations whatever on the face of the Conditions of Sale, as to any title whatever being shewn to the timber. I cannot, therefore, consider, upon the result of the Particulars and Conditions of Sale, taken as a whole, that this can be considered as a separate and distinct contract for the purchase of the timber.

If the contract for the timber is not to be considered as distinct, this is in truth a contract for the purchase of the land with the timber upon it, and the title to the land is the title to the timber; and so considering it, we must see what are the other conditions of sale with reference to the land. Now, with reference to the land, there is a distinct stipulation by the 7th condition, that the purchasers thereof shall not be entitled to have it shewn how much of the lots referred to (of which this is one) are freehold, and how much copyhold; nor to have the freehold and copyhold parts identified and distinguished, or the boundaries thereof ascertained, nor to make any inquiry concerning them; and in the description of the lot itself, it is stated, that the

(a) Condition 3. Each purchaser is to pay down immediately into the hands of Messrs. —, &c. a deposit of 20*l.* per cent. in part of the purchase-money, (including the value of the timber), and the remainder on or before the 8th day of November next.

4. If, from any cause whatever any purchase should not be completed within the time above limited, the purchaser shall pay interest at 5*l.* per cent. upon the purchase and timber money re-

maining unpaid from the said 8th day of November next, until the actual completion.

9. Upon payment of the remainder of the purchase-money, and of the amount of the valuations according to the Particulars, the vendors will (subject to the provisions of these conditions,) execute and perfect proper assurances to the several purchasers, at the expense of such purchasers.

vendors had not distinguished the copyhold part from the freehold. Now, considering the timber as part of the land which is contracted to be sold, this is in truth a stipulation that the purchaser shall not inquire into the title to the timber,—that he shall require no separate title to the timber. I think, therefore, that this is to be considered as one entire contract, and that the title to the timber depends on the title to the land.

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CROSS  
v.  
LAWRENCE.  
—  
*Judgment.*

I will put this case as if it were the case of a valuation. Suppose that, appended to the 9th condition of sale, you had found a stipulation that the timber should be taken at a valuation, how would that timber have to be valued? Undoubtedly, not according to the value of the copyhold interest, for the vendor says I am not bound to distinguish, and will not be bound to distinguish, what is freehold and what is copyhold. You cannot attribute any other meaning to the stipulation, that the timber is to be paid for at a valuation, than that it should be valued as timber, and not according to the interest that was incident to the tenure of the land. But, suppose again that all this land turned out to be copyhold, it could not be an answer to the claim on the part of the vendor (taking it as one entire contract, and the price to be paid as one entire amount), that the value which was agreed to be paid for the timber, was the value of timber on freehold land, and not of timber on copyhold land. It is quite consistent with these conditions of sale, that the whole of the land might have been copyhold; and if the purchaser could not excuse himself in that case, I do not think he can excuse himself in a case where part of the land only upon which the timber is standing may be copyhold. Again, in cases of this description, where a purchaser buys on such conditions, he must be considered as estimating,

The purchaser of undistinguished freehold and copy-

hold land and timber, under a single and entire contract, must be considered as estimating, in the price he pays for the land, the price he pays for the timber.

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LAWRENCE.  
—  
*Judgment.*

in the price he pays for the land, the price he pays for the timber. He knows that part of the land which he buys is, or may turn out to be, copyhold; that, if it be copyhold, he can only have a certain interest in the timber. He agrees to pay a certain price for the timber; and I think he must be considered as calculating in his own mind, at the time he makes the purchase, that he agrees to give a certain sum for the timber, which he may not be entitled to have that full ownership of, which he would have if the timber stood upon freehold land; and that, therefore, he makes a deduction from the purchase-money, which would compensate him for what he might not get.

A case was very ingeniously put as to fixtures, which I do not think is applicable in the way it was used on behalf of the purchaser. I take this case as to fixtures to be much more resembling the present case than that suggested: Suppose a man to say, "I agree to sell you the house with the fixtures in it. I cannot tell you what fixtures belong to the landlord, and what belong to the tenant; but you shall give me a certain sum for the fixtures." I think this Court would have no hesitation in saying, in a case of that description, it would enforce a contract against the purchaser who had entered into such a stipulation. And so it is here, where the vendor says, "I cannot tell which is copyhold;" he sells the timber as incident to the land, he says, "I cannot tell you what your interest in the timber will be; but I stipulate that you shall pay a certain sum for the value of that timber."

I think, therefore, on all these grounds, the purchaser must complete the present contract according to the conditions of sale, and pay the purchase-money, and the interest at 5*l.* per cent., and the costs.

1852.

Jan. 22.

## CROSSE v. KEENE.

UPON a sale of a portion of the same estates, and on the same conditions as in the last case, the defendant became the purchaser of another lot, described as "The Great Newson Farm," 129A. 3B. 27P., "being copyhold or customary of inheritance of the manor of *Goldcliffe*."

The timber on this estate was valued, and the price agreed upon, as in the preceding case. The only distinction was, that in this case the *whole* of the land was copyhold.

A contract for the purchase of copyhold land at a certain price, and the timber upon it at a specified valuation, enforced as one entire contract, although the vendor could not shew any custom in the manor, or license from the lord, enabling the tenants of the manor, or himself, or his assigns, to fell the timber.

—  
*Argument.*

Mr. *W. M. James*, for the purchaser, contended, that the conditions of sale did not apply to the timber in this case. In the preceding case, the notice that the land was partly freehold and partly copyhold, (it might be said), afforded the purchaser a chance of acquiring the possession of the timber, of the value of which chance he might judge, and which he might be supposed to have calculated; but, in this case, there could be no such explanation of the contract. It was unreasonable to suppose that the purchaser had entered into a contract binding himself to pay for what he could in no event have. The contract ought to be construed as meaning that the timber was to be paid for, if the vendor could, by custom, license, or otherwise, shew that he could deliver that which he had contracted to sell, and not that the timber was to be paid for whether it could be delivered or no. To repeat the illustration as to the crops, if a purchaser buying the land also contracted to purchase a crop of corn upon the land, the Court certainly would not compel him to pay the vendor of the land for the corn, if, as emblements or otherwise, some party, other than such vendor, appeared to be entitled to the crop. and

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 v.  
 KEENE.  
 —  
*Argument.*

the vendor therefore had no right to sell or deliver it. The case of timber was stronger than that of corn; for the timber not only could not be taken by the purchaser, but it prevented the full enjoyment of the land upon which it stood.

Mr. *Russell* and Mr. *D. W. Lewis*, for the vendor, were not called upon.

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VICE-CHANCELLOR:—

*Judgment.*  
 —

I cannot in principle distinguish this case from *Lawrence's* (a). It appears to me, though these Conditions of Sale do not specifically apply to the present case, that they apply to the question, for the purpose of considering whether it is one contract or two contracts. With respect to the case which has been suggested in argument, of selling the crop of corn, I think the distinction between that case and this is, that the crop of corn is not capable of continuous enjoyment with the estate. The timber is capable of continuous enjoyment with the estate. This, equally with the other, appears to me to be an agreement for the purchase of the estate with timber upon it, the timber to be enjoyed upon the estate, at a value derived upon that consideration. There must be a decree in this case similar to the last.

(a) *Supra*, p. 462.

1852.

## PHILLIPS v. PHILLIPS.

Feb. 19.

**THE** bill was filed for an account of monies received by the Defendant and his deceased partner on their joint account, on account of the Plaintiff; and of the monies which the Defendant and his deceased partner had paid on their joint account, on account of the Plaintiff; and for payment of the balance.

The bill stated, that, for several years before August, 1847, the Defendant and his brother (since deceased) carried on business as jewellers in Cockspur-street, and were in the habit, from time to time, of receiving divers sums of money from and on account of the Plaintiff, and the sums so received were treated by them as part of their co-partnership assets; and the Defendant and his partner were also in the habit, from time to time, of advancing and paying out of their co-partnership funds divers sums of money to, for, and on account of the Plaintiff; and that there was, in fact, a current account between the Plaintiff on the one part, and the Defendant and his partner on the other part; that the account was balanced in January, 1843, and a certain sum then stated and agreed to be due to the Plaintiff thereupon, as appeared by the books of the firm in the possession of the Defendant, which he refused to produce or shew to the Plaintiff; and that, between that time and August, 1847, the Defendant and his partner had received upwards of 650*l.* on account of the Plaintiff, the particulars of which would appear from the said books. The bill stated that the transactions between the Plaintiff and the Defendant and his partner were very numerous; and that, amongst other monies which they had received on account of the Plaintiff, were monies arising from the sale of divers railway shares belonging to the Plaintiff, sold by them on his account.

Demurrer allowed to a bill for an account where it did not appear that the account between the Plaintiff and Defendant was mutual, as consisting of receipts and payments by each party on account of the other, and where it did not appear that the payments forming one side of the account were other than matters of set-off as against the receipts on the other side, and notwithstanding a statement in the bill that the Defendant had, in a particular sale or transaction, acted as the agent of the Plaintiff in receiving monies on his account.

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—  
*Judgment.*

before this Court will exercise its jurisdiction. If the door of this Court be opened to entertain every case in which accounts would not be taken in an action at law, but a Court of law would send them to a reference, I do not know where there would remain any protection against suits in equity to parties between whom any account existed.

It was argued that the Plaintiff cannot know how to frame his action, until he has seen the account, and until he knows how his case stands. The answer to that is, that his remedy is not to file a bill for relief, but for discovery. The case of *Mackenzie v. Johnston*, which was cited, is the case of an agency account throughout; but the circumstance, that a party may have been agent of the other in the receipt of a certain sum of money, or in one particular matter, does not necessarily render the case one in which a bill in equity may be brought for an account. I am of opinion that this is a case in which a Court of law has jurisdiction, and that there is no ground for the interference of this Court, which does not apply to every case in which one party has received money on account of another.

Demurrer allowed.



1852.

## ROCHFORD v. HACKMAN.

24th Jan.  
& 12th Feb.

A CLAIM, filed by *William James Rochford* and *Martha Ann* his wife, against *Hackman* and another, the personal representatives of *William Rochford* the testator in the cause,—*English* the assignee under the insolvency of *Richard Rochford* the elder, the son of the testator, and *Richard Rochford* the younger, the son of *Richard Rochford* the elder, for the purpose of having the trusts of the will of the testator, so far as respected the sum of 1900*l.* Consols, executed under the direction of the Court, and to have one moiety of that sum transferred to the Plaintiffs, and the other moiety secured in Court for the benefit of the parties interested therein. The Plaintiff *Martha Ann Rochford* was one of the children of *Richard Rochford* the elder, the insolvent, and had attained twenty-one. The Defendant *Richard Rochford* the younger was his only other child, and was still an infant.

A bequest of a share of residuary personal estate in trust for *A.* for life, and after the decease of *A.* for his children equally, to be vested interests in such children at twenty-one, with power to apply the income for their maintenance during their minorities, and a gift over on default of such children; and a proviso, that if *A.* should in any manner sell, assign, transfer, incumber, or otherwise dispose of or anticipate his share or any part thereof, then, immediately after such alienation, sale, assignment, transfer, or disposition, the bequest in trust for *A.* should cease, deter-

*William Rochford* the testator, by his will, dated the 15th of August, 1822, gave and bequeathed the residue of his personal estate to *Samuel Groves* and *Thomas Hackman*, upon trust, to permit and suffer or authorise and empower his wife to receive the income for her life, and after her decease, as to one-fourth part of the residue, upon trust,

mine, and become utterly void, as if the same had not been mentioned in the will, or as if *A.* were dead. *A.*, being in prison for debt, presented a petition for his discharge under the Act 1 & 2 Vict. c. 110, and thereupon the vesting order was made:—*Held*, that there was a valid limitation over of the share of *A.*; that, taking the benefit of the Insolvent Act, was a voluntary alienation of his share by *A.*, and was the event or one of the events on which the limitation over was to take effect; that the declaration in the will, that the gift should thereupon be void as if the same had not been mentioned in the will, applied to the event of there being no children; and the declaration, that it should be void as if *A.* were dead, to the event of there being children; that, although the limitation over took effect, the capital was not to be necessarily forthwith divided, for the determination of the life-interest did not alter the class which was to take, and which class included after-born children; that the children of the insolvent who had attained twenty-one had a vested interest in their respective shares of the residuary share bequeathed in trust for the insolvent, and had become entitled to receive the interest of the same; and that the infant children of the insolvent were entitled to contingent interests in their respective shares thereof; and that both interests were subject to the interests of any after-born children of the insolvent who might become entitled.

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Statement.

to pay to, or permit and suffer, or authorise and empower, his son *Richard Rochford* (the insolvent) to receive the income for his life, and after his decease to transfer and pay the same to the child, if only one, and if more than one, unto, between, or amongst the children of his son *Richard*, share and share alike, to be vested interests in such child or children, as and when he, she, or they respectively should attain twenty-one, with survivorship as to the shares of children dying under twenty-one, and with a direction that the income of the shares of the children, or so much thereof as the trustees should think fit, should be applied for their maintenance during their minorities; and as to the other three fourths of the residue, after the death of the wife, the testator declared similar trusts,—as to one fourth, in favour of his son *James* and his children; as to another fourth, in favour of his son *William* and his children; and as to the remaining fourth, in favour of his son *John* and his children. And he then provided, that, in case any or either of his said four sons should die without leaving any child or children him or them surviving, or, being such, in case all of them should happen to die under the age of twenty-one, that the part or share, parts or shares, intended for such of his said son or sons so dying as aforesaid, and his or their respective issue as aforesaid, should be divided into as many shares as should be equal to the number of his son or sons who should be then living, or, being then dead, should have left a child or children living at his or their death or respective deaths; and thereupon, such shares should be and remain upon such trusts for his said surviving other sons and their children respectively as were thereinbefore declared with respect to the original shares. And the will contained the following clause: “And my further will is, and I do hereby expressly declare and direct, that in case my said wife, or any of my said four sons, shall in any manner sell, assign, transfer, incumber, or otherwise dispose of or anti-

cipate all or any part of her, his, or their share and interest of and in the said dividends, interest, and annual proceeds aforesaid, then and in such case, and from and immediately after such alienation, sale, assignment, transfer, or disposition shall be made, the said several bequests so hereinbefore made to or in trust for him and them as aforesaid shall cease, determine, and become utterly void to all intents and purposes, as if the same had not been mentioned in or made part of this my will, and as if my said wife or either of my said sons were dead."

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The testator died in September, 1831; and his wife in October following. Two of the sons, *William* and *John*, subsequently died without leaving any issue.

The residue of the testator's estate was invested in the purchase of 3800*l.* Consols, and the moiety of that sum (which was the subject of the claim), in the events that had happened, stood limited by the will to *Richard Rochford*, the insolvent, and his children. *Richard Rochford*, the insolvent, received the dividends of this moiety up to the 10th of October, 1850; but, on the 14th of December, 1849, being then a prisoner in actual custody for debt in the debtors prison for London and Middlesex, he presented his petition to the Court for Relief of Insolvent Debtors for his discharge from such custody, according to the provisions of the Act 1st & 2nd Vict. c. 110. By an order of that Court, dated the 17th day of December, 1849, his estate and effects were vested in the provisional assignee, and by a subsequent order of the same Court the Defendant *English* was appointed to be the assignee under the insolvency. It was admitted at the bar, that in the schedule filed by *Richard Rochford* in the Insolvent Court, especial reference was made to his life interest in a moiety of the residue under the testator's will, and to

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the provisions of the will with reference to the assignment of that interest.

The *Solicitor-General* and Mr. *Shebbeare* for the Plaintiffs; and

Mr. *De Gex* for the Defendant *Richard Rochford* the younger, argued that the interest of *Richard Rochford* the elder, the insolvent, in the residuary estate under the will had terminated on the necessary transfer of that interest by the effect of the insolvency; and that, upon such termination of interest, the children of the insolvent became entitled as upon his decease. They cited *Dommett v. Bedford* (a), *Shee v. Hale* (b), *Brandon v. Aston* (c), *Churchill v. Marks* (d), *Kearsley v. Woodcock* (e), *Martin v. Margham* (f), *Yarnold v. Moorhouse* (g), *Cooper v. Wyatt* (h), *Wilkinson v. Wilkinson* (i), *Lear v. Leggett* (k), and *Pym v. Lockyer* (l), distinguishing between the effect of voluntary and involuntary alienation. *Rishton v. Cobb* (m) was also mentioned; 1 Jarm. Wills, 823, n. (m); 1 Roper, Leg. 786 et seq.

Mr. *Tripp*, for the assignee of *Richard Rochford* the elder, the insolvent, contended, first, that the insolvent had not "sold, assigned, transferred, incumbered, or otherwise disposed of or anticipated" the trust fund within the meaning of the will. The legatee had presented his petition on the 14th of December, 1849, for his discharge from prison; that was not an alienation. On the 17th of De-

(a) 6 T. R. 684.

(b) 13 Ves. 404.

(c) 2 Y. & C. C. 24.

(d) 1 Coll. 441.

(e) 3 Hare, 185.

(f) 14 Sim. 230.

(g) 1 Russ. & My. 364.

(h) 5 Madd. 482.

(i) 3 Swanst. 515; G. Cooper, 259.

(k) 1 Russ. & My. 690.

(l) 12 Sim. 394.

(m) 5 My. & Cr. 145.

ember the vesting order was made under the Statute (a). The vesting order was not his act, but that of the Court. Secondly, that the will contained no effectual gift over on the event of alienation; and, therefore, whether there had or had not been an alienation was immaterial, as the prohibitory clause was void, and the life estate of the insolvent would subsist for the benefit of his creditors.—He cited *Bradley v. Peixoto* (b), *Ross v. Ross* (c), *Ex parte Dickson* (d).

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Mr. Baily for the trustees.

VICE-CHANCELLOR:—

In the circumstances of this case it is contended by the Plaintiffs, and the Defendant *Richard Rochford* the younger, that the insolvent's life interest in the 1900*l.* Bank Three per Cent. Annuities has ceased, and that they have become presently entitled to that fund in equal shares: as to the share of the Plaintiffs absolutely, and as to the share of the Defendant *Richard Rochford* the younger, contingently on his attaining twenty-one; but the Defendant *English*, on the other hand, insists that he is entitled to the income of the 1900*l.* Consols during the remainder of the life of *Richard Rochford* the insolvent.

Feb. 12*th.*  
 Judgment.

In determining this question, the first point for consideration appears to me to be, whether there are any fixed rules by which the Court can be guided in its determination; and upon examining the cases upon the subject, I think it will be found that there are two such rules:

(a) 1 & 2 Vict. c. 110, ss. 35, 36.

(b) 3 Ves. 324.

(c) 1 J. & W. 154.

(d) 1 Sim., N. S., 37.

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Property cannot be given for life any more than absolutely without the power of alienation being incident to the gift; and although a life interest be expressed to be given, it may be well determined by an apt limitation over.

First, that property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift; and that any mere attempt to restrict the power of alienation, whether applied to an absolute interest or to a life estate, is void, as being inconsistent with the interest given; and secondly, that although a life interest may be expressed to be given, it may be well determined by an apt limitation over.

That property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift, appears to me to be well settled by the cases of *Brandon v. Robinson* (a) and *Graves v. Dolphin* (b). In both those cases there were gifts for life, with provisions which were directed against alienation, but in neither of them was there any proviso for determining the life interest, or any gift over in the event of alienation; and the Court in each of those cases held that the life interest continued; and these cases are not, so far as I am aware, contravened by any other authority.

That, in cases where a life interest is expressed to be given, it may be well determined by an apt limitation over, is, I think, equally well settled by many authorities: *Wilkinson v. Wilkinson* (c), *Cooper v. Wyatt* (d), *Yarnold v. Moorhouse* (e), *Kearsley v. Woodcock* (f), *Martin v. Margham* (g), *Brandon v. Aston* (h), and *Churchill v. Marks* (i).

It was insisted, however, at the bar, that a further rule was to be deduced from the cases, namely, that a limitation over was in all cases essential to the determination of the life interest; and the case of *Dickson's Trust* (k) was

(a) 18 Ves. 429.

(b) 1 Sim. 66.

(c) 3 Swanst. 515.

(d) 5 Madd. 482.

(e) 1 Russ. &amp; My. 364.

(f) 3 Hare, 185.

(g) 14 Sim. 230.

(h) 2 Y. &amp; C. C. C. 24.

(i) 1 Coll. 441.

(k) 1 Sim., N. S., 37.

relied on for that purpose. For the reasons which I shall presently give, I do not think it necessary now to decide that point; but it may be well to observe upon it, that I do not understand the case of *Dickson's Trust* to have decided that the life interest would not be well determined by a proviso for cesser, though not accompanied by a limitation over; and that I do not think that any such rule is to be collected from the cases. The true rule I take to be this: The Court is to collect the intention of the testator, whether his intention was that the life interest should not continue; and it is to collect that intention from the whole will, looking to the primary disposition, for the purpose of seeing to what extent the interest is given, and to the ulterior disposition, for the purpose of seeing to what extent and in what events the primary disposition is defeated. If, on the one hand, the Court, upon this examination, finds that there is a limitation over, and that it meets the event which has occurred, it is plain that the testator did not intend the life interest to continue in that event, and it ceases accordingly, as in the cases to which I have referred; but if, on the other hand, the Court, upon the examination, finds that the limitation over does not meet the event which has occurred, there is no evidence of the testator's intention that the life interest should not continue in that event, and it therefore continues, as in *Lear v. Leggett* (a) and *Pym v. Lockyer* (b). This view of the cases appears to me to remove all difficulty upon them, and it falls in with the case of *Donnett v. Bedford* (c), in which the life interest was held to cease upon the proviso for cesser without any gift over. I think, indeed it would be difficult to hold that any greater effect can be due to the limitation over than to the express declaration of the testator that the life interest should cease.

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ROCHFORD  
v.  
HACKMAN.*Judgment.*

There is no rule that a life interest may not be well determined by a proviso for cesser, although it be not accompanied by any limitation over, *semble*.

No greater effect can be given to a limitation over than to an express declaration that the life interest shall cease.

Some observations which fell from Lord *Eldon* upon this

(a) 1 Russ. &amp; My. 690.

(b) 12 Sim. 394.

(c) 6 T. R. 684.

1852.

ROCHFORD  
v.

HACKMAN.

*Judgment.*

Import and effect of Lord Eldon's judgment in *Brandon v. Robinson*.

Distinction between a disposition to a man until he shall become bankrupt and after his bankruptcy over, and a gift to a man for life with a proviso restraining alienation.

question in the leading case of *Brandon v. Robinson* (a), appear to me to have been to some extent misapprehended, and I will venture therefore to make some few observations upon that case. Lord *Eldon*, in that judgment, first observes, that a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien (b); and the distinction between the two cases is obvious. In the former case the disposition could not possibly endure beyond the bankruptcy. In the latter, it would, if the law did not allow the proviso, or if the proviso was not couched in terms calculated, in the events which happened, to defeat the life interest; but I do not understand Lord *Eldon* to say, that the law does not allow the proviso. On the contrary, he expressly says, that if the proviso be so expressed as to amount to a limitation reducing the interest short of a life estate, neither the man nor his assigns can have it beyond the period limited; and we have here, therefore, his distinct opinion that upon a proviso so expressed the life interest would cease. He then passes to the case of *Foley v. Burnell* (c), and to the old form of trusts for the separate use of married women, for the purpose of shewing that the power of disposition accompanied the interest unless an available restriction was imposed; and he then proceeds to the particular case which he had under his consideration, and, having first shewn that the life interest was the property of the bankrupt, goes on to inquire whether there was enough in the will to shew that it could not be assigned under the Commission of Bankruptcy; on which he observes, that, "to prevent that, it must be given to some one else," meaning, as I understand the judgment, not that in all cases there must be a gift over to prevent the assignees from taking; but that, under the provisos of

(a) 18 Ves. 429.

(b) Id. 432, 433.

(c) 1 Bro. C. C. 274.



that particular will the assignees must take in the absence of such a gift over; as was clearly the case, according to the tenor of the previous part of his judgment, there being no proviso determining the life interest; and that this was Lord *Eldon's* meaning is, I think, apparent, both from what precedes and what follows upon the passage in question; for in what precedes he refers to the provisions of the whole will, and in what follows he adverts to the question whether the restrictions contained in the will could be construed into a limitation giving the interest to the residuary legatee. Lord *Eldon's* judgment in *Brandon v. Robinson* does not, therefore, appear to me to go to the extent of deciding that in all cases there must be a gift over in order to determine the life interest.

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In the present case, however, I do not, as I have already observed, think it necessary to determine that question. I am of opinion that the testator in this case has not merely provided for the cesser of the life interest, but has made a valid gift over; and I think so for this reason: According to the general rule, some effect must, if possible, be given to all the words of a will; and I see no effect which can be given to the words which follow on the cesser of the life interest, unless they be construed to operate the limitation over, for the cesser or determination of the life estate was effected by the previous provisions.

Some observation was made in the course of the argument upon the terms in which this limitation over is expressed, "as if the same had not been mentioned in or made part of this my will, or as if my said wife, or either of my said sons were dead;" but on looking at the previous provisions of the will, I think there is no difficulty in understanding what the testator here intended. In the event of any of the sons dying without leaving children, he had given over their fourths to the other sons and their child-

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 ———  
*Judgment.*

ren; and what I take him to have meant by this clause is, that the words "as if the same had not been mentioned in the will" should apply to the event of there being no children, and the words "as if they were dead" to the event of there being children. I am also of opinion that the event has occurred on which this limitation over was to take effect. I think the case in that respect is completely governed by *Shee v. Hale* (a), *Martin v. Margham* (b), *Brandon v. Aston* (c), and *Churchill v. Marks* (d); and is not affected by *Lear v. Leggett* (e) and *Pym v. Lockyer* (f); the alienation in the two latter cases being compulsory, and in the former voluntary.

Distinction between compulsory and voluntary alienation.

A learned text writer has, I observe, expressed some doubt upon the soundness of this distinction between compulsory and voluntary alienations; but I see no reason for the doubt. It cannot, I think, be said that a man has alienated when the alienation is made by the act of the law and not by his own act; and if he has not alienated, there is no breach of the condition, and the life estate is not determined. The conclusion, therefore, at which I have arrived in this case is, that the life interest of the insolvent is determined; and the remaining questions then are, whether the capital ought now to be divided, and how the income of it from the date of the insolvency is to be dealt with.

I think that the capital cannot now be divided; for I think that the determination of the life interest does not alter the class who are to take the capital, and that any after-born child of the insolvent attaining twenty-one will be entitled to share in it. The object of the proviso is to

(a) 13 Ves. 404.

(b) 14 Sim. 230.

(c) 2 Y. & C. C. C. 24.

(d) 1 Coll. 441.

(e) 1 Russ. & My. 690.

(f) 12 Sim. 394.

determine the life interest as to the beneficial enjoyment of the insolvent; and to hold it to be determined so as to alter the rights of his children would be to carry it beyond its object. The result, I think, is, that the Plaintiff *Mrs. Rochford* has a vested interest in a moiety of the 1900*l.* Consols, and the Defendant *Richard Rochford* has a contingent interest in the other moiety; but that both these interests would open, so as to let in any after-born children of the insolvent: and this being the result, I think that *Mrs. Rochford* is entitled to receive the interest of her moiety. The case, in this respect, seems to me to stand upon the same footing as the case of a vested interest liable to be divested, and in that case the party entitled to the vested interest is, as I apprehend, entitled to the income. The income of the other moiety must, I think, be accumulated.

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ROCHFORD  
v.  
HACKMAN.  
Judgment.

ADAMS v. JONES.

Feb. 21st.

THE question was, whether, under this bequest, "I give to *Clare Hannah Adams*, the wife of *Thomas Adams*, of *Walworth* aforesaid, writing-clerk, the sum of nineteen guineas," the wife of *Thomas Adams*, whose name was *Hannah*, or his daughter, whose name was *Clare Hannah*, (and who, at the date of the will, was an infant two years old), was intended, or whether the gift was void for uncertainty.

A bequest will not be held void for uncertainty, although the meaning be not absolutely certain, if the Court can arrive at a reasonable degree of certainty.

Mr. *C. Barber*, for the husband and wife, who were the Plaintiffs in the claim, argued that the wife was entitled.

Where a legacy was given to a legatee by the name and description of "*C. H.*, the wife of *A.*," *H.* being in

fact the wife of *A.*, and *C. H.* his daughter, an infant of tender years, the Court would not presume that there was any mistake in the preparation of the will; and it being more probable that the testatrix had mistaken the name, than the description, of the legatee, the Court held that the legatee intended was reasonably certain, and decreed the legacy to be paid according to the description and not according to the name.

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—  
*Argument.*

The description removed all doubt, and the use of the name "*Clare*" was immaterial. The age of the infant excluded the supposition of any mistake of one of the parties for the other.

Mr. *Begbie*, for the executor and residuary legatee, made several suggestions, to shew that the daughter had the better title. It was not probable that a Christian name would be added, although one of several Christian names might often be omitted: it was more likely that the words, "daughter of *Hannah*," were omitted between the names "*Hannah*" and "*Adams*"; and it was more likely that the gift would be made to a relation by blood, than to one who was not such a relation. The better view however was, that it was uncertain and void: *Thomas v. Thomas* (a). One person exactly answered one part of the designation, and another exactly answered another part; and it was therefore unlike any of the class of cases in which neither branch of the designation was perfectly satisfied.

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VICE-CHANCELLOR:—

*Judgment.*  
—

A disposition cannot be avoided for uncertainty, if the Court can arrive at a reasonable degree of certainty. In this case, I think the party intended to be benefited is reasonably certain. The testatrix could not have been mistaken in the description of "wife." She could not have applied that description to an infant two years old; and, therefore, if there be in fact any mistake, it could only have occurred in drawing up the will, either in taking the instructions, or in putting them into form, by inserting in the will the description "wife" instead of "daughter." The question is, whether the Court is to presume that such

(a) 6 T. R. 671.

a mistake has occurred from the name not corresponding with that of the wife, but corresponding with that of the daughter. I think the Court is not justified in presuming that the testatrix did not intend to bequeath the legacy to the wife. The Court must presume the instrument to have been correctly written. The mistake must be referred to what the testatrix might have been mistaken in, the name of the wife, and not to what she could not be mistaken in, the character of the legatee whom she intended should take the legacy. The gift differs from the case of a gift to A. second son of B., when in truth C. is second son of B. There the testator may have intended to give to A. supposing him to be the second son, and have added 'second son' by way of description; but here the testatrix never could intend to give to the daughter supposing her to be the wife. The probability is, that the testatrix knew "the wife of Thomas Adams," and made a mistake in the name.

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 ———  
 ADAMS  
 v.  
 JONES.  
 ———  
*Judgment.*

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The cases of *Blundell v. Gladstone* (a), *Newbolt v. Pryce* (b), and *Doe v. Huthwaite* (c), were also mentioned.

(a) 11 Sim. 467; *S. C.*, 1 Ph. 279.

(b) 14 Sim. 354.

(c) 3 B. & Ald. 632.

1852.

*March 5th.*

## ROBINSON v. TURNER.

Decree for foreclosure upon an original claim on further directions, and on the hearing of a supplemental claim, where the existence of an incumbrance subsequent to that of the Plaintiff was found by the Master, and the subsequent incumbrancer was brought before the Court by the supplemental claim.

ON the claim for foreclosure coming on to be heard (see p. 129), a reference was directed, to inquire whether there was any other incumbrance on the mortgaged premises. The Master found that there was another incumbrance created subsequent to that of the Plaintiff. The Plaintiff then filed his supplemental claim, and brought the subsequent incumbrancer before the Court; and the usual decree of foreclosure against the mortgagor and the subsequent incumbrancer was made upon the original claim, on further directions and on the supplemental claim.

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*Mr. Faber* for the Plaintiff.

*Mr. Bird* for the Defendants.

1852.

Feb. 9th &  
10th.

THE WARDEN AND ASSISTANTS OF THE HAR-  
BOUR OF DOVER *v.* THE SOUTH EASTERN  
RAILWAY COMPANY.

**A** MOTION for an injunction to restrain the Defendants, the South Eastern Railway Company, their servants and agents, from using or allowing a certain building erected by the Company, or any part of such building, to be used for any other than the purposes of the railway; and in particular from using or allowing the same to be used as a place for the examination of passengers' or travellers' luggage, or in any manner as or for the purposes of a Custom-house; and also in particular from using or allowing the said building or any part thereof to be used as lodging or sleeping-rooms for travellers or passengers, or for any purpose forming part of or connected with the business of an innkeeper or hotel-keeper; and that the Company might in like manner be restrained from permitting the said building to remain or continue in its present form, or in any form unapproved of as to the external elevation of such building by the Plaintiffs' surveyor, and from using or permitting to be used the said building or any part thereof for any purposes whatever, until the same shall have been, as to the external elevation, so approved.

A provision in an Act for making a railway, that certain land to be purchased by the Railway Company should be appropriated to and used solely for the purposes of the railway and the buildings connected therewith, (except such part as might be required by the Board of Ordnance, or for widening approaches to the station), and should not be used or employed for erecting thereon any coke ovens, or for any other purposes (the necessary railway purposes only excepted) by which any nuisance might be created, or

the other property of the vendors in any way damaged:—*Held*, to refer to the use of the land, or the mode in which it was to be laid out or applied, and not to refer specifically to the use of the buildings which might be erected upon the land.

That "buildings connected therewith," did not mean buildings only connected locally with the railway, but meant buildings especially applicable to the uses of that particular railway; and that the construction of the clause was not to be governed by considerations of what would or would not be connected with other and different railways.

That the building erected by the Company being used as a Custom-house for the examination of the luggage of passengers landing from the continent, many of whom travelled by the railway, such user was for a purpose connected with the railway; and that the use being, to some extent, for such purpose, it did not cease to be so within the meaning of the provision, merely because all the purposes for which the building was used were not purposes connected with the railway.

Where there is a parliamentary power to sell in fee, but with a restriction of the rights of ownership in the purchaser, and a conveyance to an owner in fee is made under such power, sound construction requires that the restriction imposed upon the purchaser, who becomes the owner in fee, shall not be extended beyond its necessary limits.

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The bill and application was founded upon the provisions of the Act of Parliament enabling "The South Eastern Railway Company to extend the line of their railway into the town of *Dover*" (a), and which provisions the bill stated were the result of an agreement between the Plaintiffs and the Company. The bill stated that Mr. *Hardwick*, the Plaintiffs' surveyor, in November, 1843, approved a plan submitted to him by the Company for the erection of buildings on the plots referred to, and some buildings were erected thereupon, and a portion of the land was left

(a) Statute 6 & 7 Vict. c. li. (Local and Personal). The clauses referred to were as follows:—Sect. 8.—"That no erection or building shall be made without the consent of the said Warden and Assistants under their common seal, or of their surveyor under his hand, upon such parts of the land or ground delineated in the plan so deposited with the Clerk of the Peace for the borough of Dover as aforesaid, as lie eastward of the line drawn on the said plan, and marked with the letters D. and E., which should exceed in height 25 feet from the level of Beach-street to the ridge of the roof of any such erection or building, or to the top of any parapet, if a flat roof should be made thereon, except on the plot of ground extending 150 feet westward from the eastern boundary of the proposed terminus of the said railway, and having a width of 60 feet from north to south measuring from the north side of the same plot, and which same plot is marked in the said supplemental plan by the letters A. B. C. D., and upon which said plot

no erection or building shall be made higher than 40 feet from the level of Beach-street aforesaid to the ridge of the roof of any such erection or building, or to the top of any parapet, if a flat roof should be made thereon."

Sect. 15.—"That the whole of the land or ground to be sold by the said Warden and Assistants to the said Company, shall be appropriated to and used solely for the purposes of the said railway, and the buildings connected therewith, except such part or portion thereof as may be required by her Majesty's Board of Ordnance, or may be necessary to be left open for the increased width of streets, in order to form the necessary approaches to the station of the said railway: Provided always that the said ground shall not be used or employed for building or erecting thereon any coke ovens, or for any other purposes (the necessary railway purposes only excepted,) by which any nuisance may be created, or the other property of the said Warden and Assistants in any way damaged."



uncovered; that, in 1851, the Defendants began to build on such uncovered land without submitting any new plan to the Plaintiff's surveyor; and the building which they then erected wholly differed from the plan of which he had approved.

The bill and affidavits alleged, that the erection of the building complained of was commenced in April, 1851; and that the same was completed, and the basement or ground floor thereof was ready for use, in September, 1851; and that the said basement or ground floor, instead of being applied for the purposes of waiting rooms, booking offices, and other railway conveniences, in accordance with the plan approved of by the said Mr. *Hardwick*, had, ever since the 29th of September, 1851, been used by the officers of her Majesty's Customs as a custom-house or place for the examination of the luggage of passengers arriving at *Dover* from the Continent of *Europe* or any foreign port; and in such place the said officers collected the duties payable to them, granted certificates to aliens, and performed the duties ordinarily discharged at her Majesty's offices for the receipt of the customs.

That the two other or upper floors of the same building had been laid out as and adapted to contain upwards of forty sleeping apartments; and which, although not yet used or appropriated as sleeping apartments, were intended to be, and were capable of being, used as sleeping apartments, and were intended to be used in connection with a large hotel lately erected by the Company, in immediate proximity to the railway station at *Dover*, upon land lately agreed to be demised by the Plaintiffs to Mr. *Macgregor*, the chairman of the Company.

The bill alleged, and the affidavits stated, the belief of the deponents that the user by the Company of the said building for such purposes caused great damage and in-

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Statement.

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 ———  
*Statement.*

jury to the property of the Plaintiffs in the town of Dover; and that many of the lessees of the Plaintiffs in the town of Dover were large inn or hotel keepers; and that the object of the Plaintiffs, in procuring the said stipulations respecting the use of the buildings to be erected by the Company to be entered into by or on the part of the Company, and to be inserted in the Act of Parliament, was to prevent the lessees and property of the Plaintiffs being injured, or such property decreased in value, through or by reason or means of the erection or user by the Company of any building not required for railway purposes.

The bill charged that the said user of the building was not a railway purpose within the meaning of the Act; and that, although the principal or main object of the Company in permitting the building to be used for the purpose of a Custom-house, and for the said other purposes, might be to increase the traffic by their railway; yet that a very important object with the Company in so doing was, to secure the advantages which would result to the hotel so erected by them by reason of the foreign and continental passengers being by the means aforesaid drawn to the immediate neighbourhood of their hotel, and thereby induced to remain, lodge, or partake of refreshments there.

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Mr. *Rolt* and Mr. *Renshaw* for the Plaintiffs, in support of the motion.

Mr. *Roundell Palmer* and Mr. *Simpson* contra.

The following cases were cited in the argument of that part of the motion which sought a mandatory injunction—to restrain the Company from keeping the building which had been erected, in the form and at the height to

which it had been raised: *Blakemore v. The Glamorgan-shire Canal Navigation* (a), *The London and Brighton Railway Company v. Cooper* (b), *Lane v. Newdigate* (c), *Greatrex v. Greatrex* (d), and *Lord Petre v. Eastern Counties Railway Company* (e).

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*Argument.*

VICE CHANCELLOR:—

After the consideration which I have had an opportunity of giving to this case, I do not think that any further time I might take would enable me to arrive at a conclusion more satisfactory to me than that which I am now prepared to state, and therefore I do not think it right to delay my judgment.

*Judgment.*

With reference to the question which has been raised upon the subject of elevation, I wish to add to what I said yesterday, that I by no means intend to lay down, that, if a building should be erected contrary to an Act of Parliament, or contrary to a contract between the parties, it would not be within the power of this Court to restrain the use of that building. I think that *Lord Petre's case* (e) would go to that extent. What I meant to say yesterday, and which I repeat to-day, is this—that, on a question of whether a building of the height of forty feet, or of the height of forty-six feet, is to be allowed to be used, there being no doubt that the building might be erected of the height of forty feet, though it could not be erected of the height of forty-six feet, that is not a case in which the Court would interfere by injunction, unless some irreparable injury were shewn to be likely to arise in the mean time. I consider, therefore, that part of the motion as having been in substance disposed of yesterday.

Although the Court has power to restrain parties from using a building which has been erected in a form that is in violation of the terms of a contract, or of an Act of Parliament, yet a small excess in the height of a building beyond that to which it might lawfully have been raised, where no irreparable injury arises from such excess in height, would not be a case in which the Court would interfere by interlocutory injunction to restrain the use of the building after it had been erected.

(a) 1 My. & K. 154.

(d) 1 De G. & S. 692.

(b) 2 Railw. Cas. 312.

(e) 3 Railw. Cas. 367.

(c) 10 Ves. 192.

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 ———  
*Judgment.*

The question now remains to be considered on the subject of the use of the building for the purpose of the Custom-house, and in connection with the bed-rooms; and the argument has been properly dealt with in the reply, and considered as confined merely to the 15th section of the Act. In truth, it is on the 15th section of the Act that the question wholly depends.

The first consideration which arises is—what is the purpose and object of the 15th section? I think the primary object of that clause is the laying out of the land purchased by the Railway Company from the Warden and Assistants, and I think so for this reason:—The words of the clause are not, that the whole of the land or ground to be sold by the Warden and Assistants to the Company, and the buildings thereon, shall be appropriated to and used solely for the purposes of the railway; but that the land or ground to be sold shall be appropriated to and used solely for the purposes of the railway and the buildings connected therewith. It is, therefore, the use of the land and ground at which the clause properly looks. And on the second branch of the clause I think the same view arises: It is, “except such part or portion thereof as may be required by the Board of Ordnance, or may be necessary to be left open for the increased width of streets, in order to form the necessary approaches to the station;” still looking, not to the use of the buildings to be erected on the land or ground, but to the mode in which the land or ground is to be laid out or applied. And the proviso seems to bear the same construction: provided “that the said ground shall not be used or employed for building or erecting thereon any coke ovens, or for any other purposes (the necessary railway purposes only excepted) by which any nuisance may be created, or the other property of the said Warden and Assistants in any way damaged.” Looking at this clause with that view, as directed to the use to be made of the land

or ground, not specifically to the use of the buildings on it, I think that this question really depends upon the narrow words which are contained in the clause, "and the buildings connected therewith."

The contract is, that the whole of the land or ground shall be appropriated to and used solely for the purposes of the railway and the buildings connected therewith; and the first question to be considered is,—What is the principle to be applied to the construction of this clause? This is a purchase, in effect a deed of conveyance, a parliamentary conveyance, under a parliamentary power to sell to a party as owner in fee; and I think, therefore, that every sound construction requires that the restriction which is imposed upon the owner in fee who becomes the purchaser under that clause shall not be enlarged or extended beyond its necessary limits.

Let us then consider what is the meaning of the words "buildings connected therewith."

I quite agree with the construction that "connected therewith" means connected with the railway; and I think there are three meanings that may be attached to those words. They may mean locally connected with the railway, they may mean connected with the railway in the sense in which other buildings are connected with other railways, or they may mean connected with the railway as buildings applicable to that particular railway. I concur in Mr. *Rolt's* argument upon that point—that they do not mean locally connected with the railway. I think that the mere fact of the buildings being locally connected with the railway could not be meant by the expression—"buildings connected therewith," as used in this Act. Do they mean buildings connected with this railway in the same sense as other buildings connected with other railways? I do not

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*Judgment.*

think that that limited construction can be put on them, for the words are "solely for the purposes of the said railway and the buildings connected therewith." I think that must be read,—“for the purposes of the said railway and the buildings connected with such particular railway.” The construction of this clause, therefore, cannot be governed by considerations of what would or would not be connected with other and different railways.

Taking the clause then as applying to buildings connected with this particular railway, it follows to be considered, what is properly, within the language of this clause, a building connected with the particular railway; and I really do not know what construction can be put upon, or what meaning can be attached to, the words “buildings connected with the railway,” unless it be buildings which are used in some portion or in some sense for the purposes of the railway. How, then, does the case stand with reference to these buildings being or not being used for the purposes of the railway? Why the fact, so far as relates to one portion of the case, as to the custom-house, is, that one of the rooms in this building is exclusively appropriated for the use of the custom-house. I think I may take this to be so. But by the side of that room there is another room, in which the passengers wait whilst their luggage is being examined by the custom-house officers; and on the other side there is another room into which the luggage, after it has been examined, is passed from the centre room, and then the luggage is separated and packed up again by the town porters (whose business seems to be, according to the evidence, to manage and carry the luggage in *Dover*), and then it is handed over a rail or partition to porters, who carry it either to the railway, or to any other place where it may be required. Now, is or is not that building so used connected with the railway? It is a building which, to some extent at least, is used for the purposes of

the railway. Can I then say that a building, which is to a certain extent used for the purposes of the railway, is not to be considered as a building connected with the railway, because other purposes are added to the use of it, and because in that building are examined not merely the luggage of passengers who pass along the railway, but the luggage of other persons who may not leave *Dover* or who may go to hotels in the town? I do not think it is a fair and reasonable construction of this Act of Parliament to hold, that, because a building is used (and I think, according to the evidence in this case, principally used) for the purpose of examining the luggage of passengers coming from abroad and passing along the railway, (and one of the affidavits states that there are very few other purposes for which it is used), it therefore follows, that it is not a building used for purposes connected with the railway. I think, that being the primary purpose, that I should not be justified in holding that the use of this building is such as the Act of Parliament does not authorise.

The last clause in the Act itself seems to me to throw some light upon the construction of the Act on this point. The first branch of the proviso is a restrictive clause, and the second branch contemplates, that the restriction imposed by the first would not be sufficient, and therefore extends that restriction. It is by the first branch of the clause that they are enabled to appropriate and use the building for the purposes of the railway, but still they might appropriate and use it for purposes that are a nuisance to the adjoining property; and the proviso is, that they shall not use it even for those purposes if they produce any nuisance to the adjoining property. I think that shews it was in the contemplation of the parties and the legislature, that the property might be used for other purposes than for the necessary purposes of the railway, provided no nuisance was created by such use; otherwise, I

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 EASTERN  
 RAILWAY CO.  
*Judgment.*

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THE SOUTH  
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*Judgment.*

do not understand what the meaning of that clause is, "or for any other purpose (the necessary purposes of the railway excepted)," by which the nuisance might be created. It seems to contemplate that it might be used for other purposes than the necessary purposes of the railway, and that those other purposes might be a nuisance, and therefore it provides that it shall not be used for a nuisance.

Upon the whole construction therefore of this clause, I am of opinion that I cannot grant this injunction with reference to the Custom-house.

Then, as to the bed-rooms, I think the same argument that applies to the one, applies also to the other. I am not prepared to say that there may not hereafter be such a use of these bed-rooms as would induce this Court to interfere; but as the case at present stands, I think there is no evidence before me that there is any intention to use them for any such purposes as would warrant me in holding that the building is not *bonâ fide* intended to be used and to be considered as a building connected with the railway.

Upon the whole I must refuse this motion, but I shall certainly refuse it without costs.



## BEADEN v. KING.

THE Plaintiff, the prebendary of the prebend of *Wiveliscombe*, in the Cathedral Church of *Wells*, filed his bill in May, 1848, against the Rev. *Walker King*, *Thomas Pares*, and *Edward Dawson*, and the Rev. *C. E. R. Keene*, for the purpose of setting aside a purchase of part of the prebendal estate, made in the year 1808, under the Land-tax Redemption Acts, by or in the name of *John King*, as trustee for the late Dr. *King*, who afterwards became Bishop of *Rochester*.

Dr. *King* was, from 1794 until his death in 1827, the prebendary of the prebend.

The prebend of *Wiveliscombe*, before and at the time of the sale in question, comprised (amongst other property) the rectory or parsonage impropriate of *Wiveliscombe*, with the glebe lands, tithes, and hereditaments belonging there-

been made from a prebendary in his corporate character to a prebendary in his individual character.

An objection to the validity of a sale under the Land-tax Redemption Acts, upon the ground that the lands were not properly saleable, and, apart from any question of fraud, were not properly sold under the Acts, is a legal objection; and there being no impediment to the trial of that question at law, a bill in equity on such a ground cannot be supported.

But, the confirming statutes 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, have removed any objection to a sale and conveyance under the Land-tax Redemption Acts, arising from the property so sold not having been originally saleable, or not having been properly sold, within the meaning and according to the directions of the Acts.

If it were shewn that a purchase under the Land-tax Redemption Acts had been effected by fraud, the Court would rectify it, notwithstanding the confirming statutes, for a purchase so effected would not acquire validity from those statutes.

The restriction expressed or implied in the words of sect. 25 of the confirming statute 57 Geo. 3, c. 100—"the titles derived under such sales," construed to mean that the Acts were not to operate upon titles anterior to the sales under those Acts, and not to limit the confirmation to the titles of sub-purchasers only.

Under the statutes for the redemption of the land-tax, the Lords Commissioners are placed in the position of vendors; and, therefore, if the trustees of a charity should purchase the property of the charity under those Acts, they would not be purchasing from themselves, but from the Lords Commissioners.

The confirming statutes 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, remove any objection which might have been raised on the ground of the party selling (under the Acts) being both vendor and purchaser.

1851.

*June 4th, 6th,  
7th, 8th, 10th,  
11th, 26th,  
27th, & 30th;  
July 1st, 2nd,  
7th, & 10th;  
1852.*

*Jan. 27th.*  
The legislature intended, by the Acts for the redemption of the land-tax, to authorise all such sales for that purpose to be made by ecclesiastical persons, with the consent thereby required, as could have been made for any purpose, with the like consent, before the passing of the restraining statutes; and before the restraining statutes, a sale might have

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to, and also the manor of the prebend of *Wiveliscombe*, with demesne lands and other lands held of the manor for lives by copy. The prebend was usually demised by the prebendaries for lives at an antient rent, in consideration of fines. The lessee of the prebend was called the Lord Farmer, and had power to make grants for three lives of the lands held by copy.

By an indenture of the 13th of June, 1789, the Rev. *P. G. Snow*, the then prebendary, demised the prebend to *Arthur Lord Fairford*, for the lives of *William Earl of Dartmouth*, *Henry Lord Stowell*, and *Arthur Lord Fairford*, and the life of every and either of them longest living. By another indenture of the 3rd of July, 1804, and made between *George Earl of Dartmouth*, *William Charles Earl of Albemarle*, and *Thomas Clement*, of the first part; *Henry Lord Stowell*, of the second part; and *John King* (who was the brother of Dr. King, and an Under Secretary of State), of the third part; after recitals, by which it appeared that *Henry Lord Stowell* was the surviving cestui que vie in the lease, and that the lease had become vested in the parties thereto of the first part, with power to sell, with the consent of the said *Henry Lord Stowell*; the premises comprised in the lease were, in consideration of 7000*l.* expressed to be paid by *John King*, conveyed to him, To hold for the life of the said Lord *Stowell*. By an indenture of the 4th of July, 1804, and made between *John King* and Dr. King, *John King* surrendered the lease and the premises comprised therein to Dr. King.

By an indenture, dated the 5th of July, 1804, Dr. King demised the prebend to *John King* for the lives of *Walker King*, aged six years, *Edward Dawson King*, aged about five years, and *James King*, aged about three years, sons of Dr. King, and for the life of any and either of them longest living, at the old rent of 40*l.* There is a memo-

random upon this lease of livery of seisin having been given on the 18th of July, 1804. This lease was made to *John King* in trust for *Dr. King*.

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A joint memorial and statement, signed by *Dr. King* and *John King*, and dated the 1st of May, 1806, was laid before the Lords Commissioners appointed under the Great Seal (a).

(a) "For regulating, directing, approving and confirming all such sales and contracts for sale which shall be made by bodies politic or corporate, or companies, for the purpose of redeeming any land tax, &c." (39 Geo. 3, c. 21, s. 2).

The memorial or statement of 1806, was to the effect, that *Dr. King*, intending to redeem the land-tax charged on estates belonging to the prebend, amounting to 72*l.* 6*s.* 3*d.* per annum, had agreed with *John King* to sell and convey to him, freed and discharged from land-tax, for the price and on the terms after mentioned, the manor and copyhold tenements specified in the subjoined survey and valuation (being part of the estates of the prebend) and held by *John King* under a lease, for the lives of *Walker King*, aged seven, *Edw. D. King*, aged six, and *James King*, aged five years, dated the 5th of July, 1804, the lease being in settlement. The annual value is stated at 388*l.* 0*s.* 8½*d.*, with a note that the whole is or may be granted by copy of court roll for five lives, as appears by the affidavit annexed. The reserved rent is stated at 3*l.* 15*s.* 2*d.*, and the purchase-money is thus made up :

Reserved rent, 25 years	
purchase . . . . .	93 19 2
Reversion after five lives,	
at 5½ years purchase	2134 3 8
Value of the timber . . . . .	24 17 7
	<hr/>
	£2253 0 5

And it then purports that the land-tax, 72*l.* 6*s.* 3*d.*, is to be redeemed by *Dr. King*, the purchase-money to be paid into the Bank of *England* on a day which is in blank; and that *John King* agrees to purchase on the terms above mentioned. It also purports to have, at the foot of it, the approval of the sale of the premises by the Bishop of *Bath* and *Wells*. There did not, when the memorial was brought before the Court, appear to be any affidavit annexed to it, nor any survey or valuation subjoined, by which it would appear what were the premises which formed the subject of the then proposed purchase; but there was in evidence in the cause a valuation made by a *Mr. Kingdom*, which agreed with the memorial as to the annual value, the reserved rent, and the value of the timber; and there was no doubt that the premises comprised in that valuation were the premises referred to by the memorial.

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The purchase proposed by this memorial was not carried out; but in April, 1808, another joint memorial and statement, signed by Dr *King* and *John King*, was laid before the same Lords Commissioners. This second memorial and statement appear to have been in the first instance intended to be prefaced by an affidavit to be made by *John King*,—described as a trustee named by and on the part and behalf of Dr. *King*,—to the effect that the lease of the estate mentioned in the memorial, of which estate he had agreed to purchase the fee simple, was not limited or settled to any uses or trusts whatever, but that the said leasehold estate was the sole property of Dr. *King*; but this proposed affidavit was struck through in pencil, and this memorial was in fact prefaced by an affidavit of Dr. *King*, that the lease of the estate within mentioned (of which estate *John King*, lessee in trust for Dr. *King*, had agreed to purchase the fee simple,) was not limited or settled to any other uses or trusts whatever, but that the said leasehold estate was his own sole property. This second memorial and statement purported that Dr. *King*, intending to redeem a part of the land-tax charged on estates belonging to the prebend, had agreed with *John King* to sell and convey to him, for the price and on the terms thereafter mentioned, the manor, lands, and tenements specified in the subjoined survey and valuation, being part of the estates of Dr. *King*, and then held by *John King* under a lease for the lives of *Walker King*, aged nine years and three-quarters, *Edward D. King*, eight years and three-quarters, and *James King*, six years and three-quarters, dated the 5th of July, 1804 (a).

After the date of the memorial of 1808, two contracts were entered into with the Commissioners for the redemp-

(a) The price and terms were thus stated by this memorial:— The annual value was stated at 388*l.* 0*s.* 8*d.* A total yearly

tion of land-tax; and on the 25th of May, 1808, they issued two certificates, by one of which (No. 2261), after setting

value of 71*l.* 5*s.* 11½*d.* was then thus deduced:—

One sixth of fineable value . . . . .	64 13 4
Lord's Rents . . . . .	3 15 2
Average yearly value of the heriots . . . .	2 17 5½
	<hr/>
	£71 5 11½

Six years purchase .	427 15 10½
Value of timber . .	24 17 7
Making the purchase-money . . . . .	<hr/>
	£452 13 5½

The memorial then stated, that the land-tax, 14*l.* 4*s.* 9½*d.*, is to be redeemed by *John King*, the purchase-money to be paid into the Bank on a day left in blank; and that *John King* agreed to purchase on the terms above mentioned. To the memorial there was subjoined, under the heading "Surveyor's Estimate," the form of an affidavit to be made by a surveyor, stating, that, at a time mentioned, he viewed the estate after described, belonging to *Dr. King*; that the same was of the annual value therein after stated; and that the sale thereof would not in anywise prejudice or inconvenience the possession of any other property belonging to *Dr. King*; but that the same was in his judgment and opinion proper to be sold, for the purpose of redeeming the land-tax charged on estates belonging to *Dr. King*; this affidavit was in blank, both as to the deponent, the time of survey, and the person whose estate was surveyed. Against it in the mar-

gin was written "Mr. *Kingdom's* deposition on oath to this effect, together with his survey and estimate of the yearly value of the manor and tenements, and of the average yearly value of the heriots are hereunto annexed." And at the foot of this form of affidavit was the following description of the estate intended to have been referred to in it, with the following particulars of its value: "Consisting of the manor of the prebend of *Wiveliscombe*, and comprising sundry lands and tenements specified in the survey annexed, all of which are or may be granted by the lord farmer (or lessee of the prebendary) to copyhold tenants for five lives, by the custom of the manor, as appears by Mr. *Kingdom's* deposition. The particulars are:—

Gross yearly value of lands and tenements . . . . .	498 15 0
Deductions, including land-tax, lord's rents and heriots . . . . .	110 14 3½
	<hr/>
Net yearly value of lands and tenements . . . . .	388 0 8½
One sixth, being the fineable value of the above . . . . .	64 13 4
Lord's rents . . . . .	3 15 2
Average yearly value of heriots . . . . .	2 17 5½
	<hr/>
Total yearly value of manor . . . . .	71 5 11½

And the description and par-

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forth a list of the premises belonging to Dr. *King*, prebendary of the prebend of *Wiveliscombe*, the land-tax whereof was proposed to be redeemed, they certified that they had agreed with Dr. *King*, prebendary of the prebend of *Wiveliscombe*, for the redemption by him of 17*l.* land-tax, charged upon part of the rectory or parsonage impropriate of *Wiveliscombe*, with the glebe lands, tithes, and hereditaments belonging thereto, assessed in the assessment for the year 1805 by the description—Dr. *King* proprietor, *Thomas Stone* occupier, 37*l.* 6*s.* 8*d.* sum assessed; of which sum the adjusted proportion of the premises above mentioned, and thereby intended to be redeemed, was 17*l.*, and the consideration was declared to be 623*l.* in the 3*l.* per cent. Consolidated or Reduced Bank Annuities, or one of them, to be transferred to the Commissioners for the Reduction of the National Debt at the Bank of *England*, in the proportions and at the times therein mentioned, with interest, to be paid at the time of the second and each subsequent instalment, to the cashier of the Bank, to the account of the Land-tax Redeemed, deducting therefrom a sum bearing the same proportion to such land-tax as the amount of stock transferred before the time of each payment bears to the whole amount of stock agreed to be transferred in such contract; and by the other of which certificates (No. 2260), the Commissioners certified that they had agreed with *John King* for the redemption by him of the sum of 13*l.* 10*s.* 8*d.* land-tax, being the land-tax charged upon the lands and hereditaments therein mentioned (and which are the same lands and hereditaments as are comprised in the indenture after stated), parts of the manor of the prebend of *Wiveliscombe*; and the consideration was thereby stated to be 496*l.* 6*s.* 0*d.*, 3*l.* per cent. Consolidated or Reduced

particulars are followed by a memorandum declaring the consent of the bishop to the sale of the lands and tenements specified in the

memorial. No such deposition of Mr. *Kingdom*, as was referred to in the memorial, appeared to be annexed to it.

Annuities, or one of them, to be transferred at the same times, and with the like provision as to payment of interest on the instalments as mentioned in the first certificate.

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After the granting of these certificates, an indenture, dated the 1st of June, 1808, was made between Dr. *King*, described as the prebendary or parson of the prebend or parsonage of *Wiveliscombe*, of the first part; Lord *Auckland* and Lord *Glenbervie*, two of the said Commissioners appointed &c. (a), of the second part; and *John King*, described as a trustee nominated by and on behalf of Dr. *King*, of the third part; whereby, after reciting that Dr. *King*, being desirous of availing himself of the powers which, by the Act of the 42nd of Geo. 3, were given to bodies corporate or corporations, for enabling them to sell a competent part of their manors, messuages, lands, tenements, and hereditaments, for redeeming their land-tax, had contracted and agreed to sell to *John King* the messuages, lands, heriots, and hereditaments thereafter described, being parts of the estates which he was entitled to in right of his prebend of *Wiveliscombe*, for the sum of 452*l.* 15*s.* 1*d.*; and that the Commissioners, parties thereto, had agreed to confirm such contract; and further reciting, that Dr. *King* had advanced the sum of 425*l.* 8*s.* 6*d.*, which had been applied to redeem his land-tax, it was witnessed, that, in consideration of 27*l.* 5*s.* 7*d.* paid by *John King* to Dr. *King*, in discharge of the costs and expenses attending sales made by Dr. *King* for the redemption of his land-tax, (which the Commissioners allowed), and in consideration of 425*l.* 8*s.* 6*d.* paid by *John King* to Dr. *King* by the direction of the Commissioners, Dr. *King*, in exercise of the powers vested in him by the Act, with the consent, authority, and approbation of the Commissioners, conveyed, and the Commissioners confirmed, to *John King*

(a) See p. 501, n. (a.)

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and his heirs the manor of the prebend of *Wiveliscombe*, and a number of distinct tenements therein particularly described; all which premises were by the deed described as part of the estate held under the lease of the 5th of July, 1804, granted by Dr. *King* to *John King*, at the yearly rent of 40*l.*, (and which yearly rent the deed stated was to remain payable out of the rectorial tithes and certain demesne lands which were not intended to be sold and conveyed), To hold to the use of *John King*, his heirs and assigns, in trust, nevertheless, for Dr. *King*, his heirs and assigns, for ever.

The tenements comprised in the deed were all held of the manor by copy, except three of them,—one called *South Chullick*, which had been demised with the glebe; and two called "*Grant's tenements*," which had been demised for lives in the year 1804. The execution of the deed by Lord *Glenbervie*, one of the Commissioners, was attested by *John James*, who was the solicitor of Dr. *King*.

The reversions of different parts of the property comprised in this deed, expectant on the grants for lives, were afterwards, from time to time, and principally in the year 1812, sold by Dr. *King* for sums which amounted in the whole to above 2,000*l.*; and in the month of April, 1823, he conveyed to the Defendant *Walker King* all such parts of the property comprised in the deed as had not been sold by him;—the Defendant *Walker King*, in consideration thereof, assigning to Dr. *King*, by an indenture of even date, certain valuable interests to which he was entitled. The reversions of other parts of the property comprised in the purchase-deed, expectant on the grants for lives, were afterwards, from time to time, sold by the Defendant *Walker King*, for sums amounting to above 3000*l.*; and a very considerable part of the property comprised in the deed still remained unsold.



Dr. *King* died in 1827, having by his will appointed *William Leigh* and the Defendants *Pares* and *Dawson* his executors. *Leigh* died in 1844, and *Pares* and *Dawson* were the surviving personal representatives of Dr. *King*. Dr. *King* was succeeded in the prebend of *Wiveliscombe* by the Rev. *C. E. R. Keene*.

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By an indenture, bearing date the 12th of June, 1827, the Rev. *C. E. R. Keene* demised the prebend to *Pares*, *Dawson*, and *Leigh* for the lives of the Defendant *Walker King* and *James King*, and for the life of the longer liver of them; and in this lease the premises comprised in the deed of 1808 were excepted; and these excepted premises were described to have been formerly part of the prebend, and to have been sold and duly conveyed unto and to the use of *John King*, his heirs and assigns, in trust, nevertheless, for Dr. *King*, then prebendary or parson of the said prebend or parsonage, his heirs and assigns, under and by virtue of the Act 42 Geo. 3, c. 116; and it was mentioned, that, by means of such sale or the money produced thereby, 17*l.*, part of the land-tax charged on the rectory or parsonage, with the glebe lands, tithes, and hereditaments belonging thereto, was redeemed. And the rent reserved by this lease was the old rent of 40*l.*, and the sum of 17*l.* the redeemed land-tax.

Upon the resignation of the Rev. *C. E. R. Keene*, in the year 1833, the Plaintiff became the prebendary of *Wiveliscombe*; and he had ever since held the prebend and received the rent reserved by the lease of June, 1827, including the 17*l.* redeemed land-tax.

The case made by the bill was—That there never was any valid surrender of the lease of 1789; and that the lease of 1804 was therefore void; or, if not, that it had since become merged, or been surrendered, or otherwise

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vacated; that, before the memorials were presented to the Commissioners, Dr. *King* had ascertained, by valuations and estimates made by *Kingdom*, that the monies which might be obtained by the sale of the reversionary estate in fee to which the prebendary was entitled, in such of the premises as were subject to grants for lives, or from the enfranchisement of copyhold tenements holden of the manor, would greatly exceed the amount required for the redemption of the land-tax on the whole of the prebendal estate; and that he presented the memorial of 1806 under the conception that he could retain for his own use the excess of the monies which might be obtained by the sale, beyond what would be required for the redemption of the land-tax on the whole estate; and that, on being afterwards informed that he could not retain such surplus, he withdrew that proposal; that the memorial of 1808 was a contrivance on the part of Dr. *King* to acquire the property comprised in the purchase-deed as his own, by a pretended exercise of the powers of the Acts; that it was represented to the Commissioners, by or on the behalf of Dr. *King*, that the valuation set forth in the memorial was verified on oath by the affidavit of some competent person, and that it was proved by such affidavit that the lease of the premises was not held in trust or in settlement; and that it was also shewn by affidavit that the reserved rent of 40*l.* was to continue payable out of the demesne lands and the rectorial tithes, which were not intended to be sold; and that it was further represented to the Lords Commissioners, that it was the fact, and was proved by the affidavit of the surveyor employed for the purposes of the redemption, that the estate might be granted out by the lessee for five lives, at small reserved rents, amounting to 3*l.* 15*s.* 2*d.*; but that no such affidavit as to any of these matters was in fact ever made or produced to the Commissioners or left in their office; and that it was not true that the lease was not in trust or settlement, *John King* being a trustee

thereof for Dr. *King*; and that it was not true that the estate or any part thereof might be granted out by the lessee for five lives; but on the contrary, that, according to the existing custom, such of the premises as were granted for lives were granted for three lives only, and such of the premises as were held for lives were granted for not more than three lives, and that parts of the premises could not be granted by the lessee beyond the duration of his own lease; that the Commissioners approved the proposal upon the faith of the representations which were made to them, and relying on the official position and character of Dr. *King* and his brother, and did not properly investigate the transaction or require further information to be furnished to them; that they were misled and deceived by statements and misrepresentations made to them by Dr. *King*, whereby he mystified, concealed, and misrepresented the transaction; that they never properly understood or were aware of the true state of the case in respect of the nature or value of the premises or the circumstances and object under or for which the sale and conveyance were made; and that they were not aware and did not understand that the sale was in fact a sale by Dr. *King* as prebendary, in the character of vendor, to himself in his private and individual character as purchaser; and that they were not informed, on behalf of Dr. *King*, nor were aware, when they approved the proposal, that *John King* was not purchaser on his own behalf, or that Dr. *King* was purchasing in his name as trustee; that Dr. *King*, before he made the proposal, had obtained the approval of the bishop by partial, inaccurate, and unfounded representations, and by undue means; and that such approval was obtained before the arrangement, afterwards carried into effect, had been definitively formed and settled; that the premises and the estate and interest therein proposed by the memorial of 1808 to be sold for 452*l.* 15*s.* 5½*d.* were the same as had been previously agreed to be sold for 2253*l.* 0*s.* 5*d.*, and

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were well worth that sum at least; that the value of the premises and of the estate and interest conveyed very far exceeded the 452*l.* 14*s.* 1*d.*; and that this had been ascertained by Dr. *King* before the proceedings before the Commissioners were instituted, and when the deed of conveyance was executed; that the sale was made by Dr. *King* in a fiduciary character, and as trustee for the prebendary for the time being and his successors, and that he consulted his individual interest to the prejudice of his successors; that the Acts of Parliament relating to the redemption of the land-tax did not contemplate or authorise a sale by a person in the position of Dr. *King*, as prebendary, to himself in his private character; that they did not authorise a sale for redemption of 17*l.*, part only of an entire sum of 37*l.* 6*s.* 8*d.* charged upon the premises; that parts of the premises conveyed by the deed of 1808 were of the nature of copyhold tenure, held under the prebendary or his assigns, as lord of the manor, by grants made by copy of court roll, for lives or life; and that the sale thereof, in the manner in which it was made, was not authorised by the statutes; that, from the nature of the premises sold, and of the other premises constituting the estate of the prebendary, the sale was not authorised by such statutes; that if Dr. *King* had power to sell for the redemption of land-tax, he was only empowered to sell discharged of land-tax; and that although the deed of 1808 purported that the premises were sold and conveyed discharged of land-tax, yet that, at the date of the deed, and until the 22nd of June, 1808, when the certificates were registered, and until the 1st of May, 1810, (when the whole of the stock and interest, according to certificate 2260, were to be transferred and paid for the redemption of the land-tax of the premises therein mentioned, being part of the premises comprised in such indenture,) such part was not freed and discharged, but was subject to the land-tax thereby contracted to be redeemed; and that the land-tax of the other premises com-

prised in the indenture was not, by the certificates, or either of them, or otherwise, redeemed or contracted to be redeemed, but had always been chargeable thereon; that the rents, profits, and services reserved and payable in respect of the premises comprised in the indenture of June, 1808, were not sold with the premises and the inheritance therein; and in particular that the whole rent of 40*l.* was thrown upon the premises comprised in the lease which were not comprised in the deed of the 1st of June, 1808, instead of an apportioned part of the rent being sold with the premises comprised in that indenture; and that the sale was not made conformably to the provisions of and in the manner required by the law relating to such matters.

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The Defendants, by their answers, denied that the lease of 1804 was invalid or void, or that it had become merged or been surrendered, vacated, or avoided; and they insisted, that, if the indenture of the 1st of June, 1808, was not a good and valid deed, the lease of 1804 was, so far as regarded the premises comprised in that indenture, a valid and subsisting lease, during the lives of the Defendant *William King* and his brother *James King*, and the life of the survivor of them. They stated their belief that Dr. *King* was desirous of availing himself of the powers of sale given by the Act 42 Geo. 3, c. 116, and of becoming the purchaser of the manor and premises comprised in the deed of the 1st of June, 1808, and in that sense was desirous of acquiring the property as his own private property, by the exercise of the powers of the Act; but they said they did not believe that he desired to do so by any undue or pretended exercise of those powers: they said they believed that the 2253*l.* 0*s.* 5*d.* mentioned in the memorial of 1806, was computed to be the value of the reversion of the premises after five concurrent lives, being the number of lives for which, in several instances, the lessee or lord farmer of the manor appeared to have been used to grant the copy-

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hold or customary tenements comprised within it, without any estimate or account being made of the respective interests in the reversion of *John King* as lessee or lord farmer of the manor under the lease of 1804, and of *Dr. King* as prebendary after the determination of the lease; and that, if any such estimate or account had been made, it would have appeared, as they believed the fact to be, that five sixths of the computed value would have been justly due to the lord farmer or lessee in respect of his interest under the lease; and that one sixth only of the computed value would have been due to the prebendary in respect of his interest in the reversion after the determination of the lease; and they said, they believed that the agreement contained in this memorial was not carried into effect, in consequence of the forms of the Acts of Parliament for the redemption of the land-tax not providing for or permitting any just apportionment of the respective interests of the lord farmer or lessee, and of the prebendary, in the proceeds of sales effected under the Acts; and that if such apportionment could have been made, the proportion which would have been due to the prebendary in respect of his interest in the 2253*l.* 0*s.* 5*d.*, if the sale had been completed, would have been less than the sum of 452*l.* 15*s.* 5¼*d.* They further said, they believed that, under these circumstances, a separate valuation was afterwards made of the interest of the prebendary in the reversion intended to be sold, as distinct from the interest of the lord farmer or lessee therein; and that the interest of the prebendary in the reversion was agreed to be considered worth the sum of 452*l.* 15*s.* 5¼*d.*, though they believed that that sum exceeded the exact amount of the prebendary's interest; and they also said, they believed that all the same parties who were privy and consented to the valuation made of the whole interest of the lord farmer or lessee, and of the prebendary in the reversion of the premises, and which together was valued or computed at 2253*l.* 0*s.* 5*d.*, were likewise privy and con-

sented to the estimate or valuation of the interest of the prebendary therein; and that the same was in fact most carefully ascertained and found to be the full value of the interest of the prebendary in such reversion. They said, they believed that the value of the premises described in the deed of the 1st of June, 1808, and of the estate and interest in the same thereby conveyed, did not exceed the sum of 452*l.* 14*s.* 1*d.*; and that the value of the premises at the time of the purchase thereof would not have equalled that sum, if the 496*l.* 6*s.* 3*d.* Consols, the value of the land-tax charged thereon, had not been paid by Dr. *King* out of his own monies; and that the 452*l.* 14*s.* 1*d.* was found to be the real and fair value of the premises described in the indenture, and of the estate and interest in the same thereby conveyed, redeemed of land-tax, according to the estimate or valuation of *S. Kingdom* deceased, who in his lifetime was a land surveyor of great eminence and experience; and that the Commissioners relied upon and adopted the estimate and valuation of *Kingdom*, as being a competent surveyor. They said, they believed that Dr. *King* openly and avowedly stated and declared, that the name of *John King* was used only as a trustee for him (Dr. *King*); and that all persons in any way interested or concerned in the transaction were at the time, and had ever since been, perfectly cognisant and fully aware of the precise relation of the parties in the transaction, and of all the facts and circumstances relating thereto; and they denied, to the best of their belief, that the Commissioners were misled or deceived, or were induced to confirm the transaction, by any other means than the ordinary and regular discharge of their duties; and they believed that the Commissioners were fully aware and perfectly understood that the sale was in effect a sale by Dr. *King*, as prebendary, in the character of vendor, to himself in his own private and individual character as purchaser. They stated the lease of 1827, and relied upon the Plaintiff's receipt of the 17*l.*,

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redeemed land-tax under it. They said, that if, under any circumstances, the indenture of the 1st June, 1808, could be set aside as void, the Plaintiff could derive no benefit therefrom during the lives of the Defendant *William King* and of *James King*, and the life of the survivor of them; the Defendant *William King* and *James King* being two of the lives named in the lease of 1804, and that lease never having been surrendered; and they insisted, that the Plaintiff had no present right in the matter in question in the suit, to entitle him, under any circumstances, to maintain it against them. They insisted upon the statute 57 Geo. 3, c. 100 (a), as confirming the transaction, and upon

(a) Sect 25. "And whereas, for the purpose of redeeming or purchasing land-tax, or of raising money for re-imbursing the stock or money previously transferred or paid as the consideration for redeeming land-tax, or for purchasing assignments of land-tax, or for some other purposes for which lands and hereditaments were authorised to be sold under the powers and provisions of the Acts heretofore passed relating to the redemption and sale of the land-tax, or some of them, some sales of lands and other hereditaments have been made, the titles to which, as derived under such sales, may be considered void or voidable, or liable to be impeached at law or in equity, or be liable to objections calculated to impede the free alienation thereof: Now, be it further enacted, That all sales made, and all conveyances executed, of lands or other hereditaments sold for the purpose of redeeming or purchasing land-tax,

or for raising money as hereinbefore is mentioned, provided such conveyances shall appear to have been executed under the authority and with the consent and approbation of the respective Commissioners for the time being authorised to consent to sales made under the powers of the said Acts respectively, or any of them, shall be, and the same are hereby, ratified and confirmed from the respective periods at which such sales and conveyances were respectively made and executed, and the same shall be from such respective periods valid and effectual, and be considered as conferring upon the respective purchasers of the lands and hereditaments therein respectively comprised, and all persons claiming by, from, through, under, or in trust for them respectively, a good and valid title, both at law and in equity, to such lands or hereditaments to all intents and purposes whatsoever, anything in the said Acts or any



the several statutes for the limitation of suits and actions; and the Defendant *William King* set up a case of purchase for valuable consideration without notice under the deeds of 1823.

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Mr. *Bethell*, Mr. *Rolt*, and Mr. *Bazalgette*, for the Plaintiff.

Argument.

Sir *F. Kelly*, Mr. *Malins*, and Mr. *Heberden*, for the Defendant *Walker King*.

Mr. *James Parker* and Mr. *Metcalf* for the Defendants, the executors of Dr. *King*.

The argument occupied many days; and besides that which related to the general question of the right of the Plaintiff to disturb the transaction of 1808 (on which the points are fully stated in the judgment), much discussion took place on questions relating to the specific relief prayed by the bill,—that the deed might be either set aside and declared void, or dealt with as the Court should direct, without prejudice to the rights of purchasers for valuable consideration; and that the executors of Dr. *King* might, out of his assets, pay to the Plaintiff, or otherwise as the Court should direct, for the benefit of the Plaintiff and his successors, the proceeds of the sales of the lands which he had made, and the proceeds of the timber which had been sold by him, and the monies received by him for the enfranchisement of the copyholds; and that the Defendant *Walker King* might pay the proceeds of the like sales and monies received since the death of Dr. *King*; and that the

law or custom to the contrary notwithstanding.”

Sect. 26, contains a proviso for the relief of persons injured by the sales thereby confirmed,

making claim within five years from the passing of the Act or the termination of a legal disability.

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—  
*Argument.*

Defendant *John King* might be declared to be a trustee of the lands, which remained vested in him, for the Plaintiff and his successors; and that the same might be re-conveyed, discharged of the lease of July, 1804. The Defendants contended, that the purchasers of the lands were necessary parties, and that it was not sufficient to waive relief against them, whilst the Plaintiff sought to recover from the Defendants on the record the purchase monies which they had paid. The result of the suit rendered a decision on the question of parties unnecessary, as it did also on the other questions respecting the form and nature of the primary and consequential relief sought.

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—  
*Judgment.*

The VICE-CHANCELLOR, after stating the facts—

There are three principal questions raised by this bill: First, whether the property to which the suit relates was properly saleable, and, apart from any question of fraud, was properly sold under the provisions of the Land-tax Redemption Acts. Secondly, whether, under the provisions of those Acts, it was competent to Dr. *King* to become the purchaser of the property. And thirdly, whether, assuming that Dr. *King* could purchase, the transaction of purchase in this case is tainted with fraud, and can and ought, under the circumstances, now to be set aside by this Court.

With respect to the first question, several grounds are assigned by this bill, and were argued at the bar in support of the Plaintiff's position, that this property was not saleable, and, apart from any question of fraud, was not properly sold under the provisions of the Acts; but, upon examining those grounds, they appear to me to resolve themselves entirely into legal objections to the validity of this sale; and if this sale be invalid at law this bill states

no impediment to the Plaintiff's recovering at law; nor is it framed for removing any such impediment if the Plaintiff has any present right in equity to remove it. On the contrary, the bill takes no notice of the lease of 1827 (from which, however, the property was excepted), and it states the lease of 1789 to be determined, and the lease of 1804 to be absolutely void, and thus makes it clear, that, as to these objections at least, the Plaintiff has a complete remedy at law. I cannot, therefore, regard these objections as having any bearing upon this case, except so far as they tend to support the case of fraud alleged by this bill, in which view I shall presently consider them. Looking at them in any other light, I think it would be my duty at once to dismiss this bill, so far as it rests upon these grounds. It is right, however, to add, that, having considered these points, I am satisfied that the confirming statutes have removed any objections which might originally have been raised upon them.

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With respect to the second question, the right of *Dr. King* to purchase under the provisions of the Act, the question must, I think, depend upon the construction of the Act; and for the purpose of determining it, it is necessary to look, not merely at the particular clause which gives the power to purchase, but at the other clauses of the Act, and the provisions of the prior Acts with reference to the same subject.

These Acts were passed, as appears from the preamble in the first of them, the 38 Geo. 3, c. 60, for a great public object, to strengthen the public credit and improve the national resources; and they must receive, therefore, such a construction as will extend and not limit that purpose. The same sales which were afterwards authorised by the 42 Geo. 3, c. 116, were authorised by the 19th sect. of the 38 Geo. 3, c. 60; but that section required that such sales,

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conveyances, mortgages, or grants, should be made with the consent of the persons by whom they could, before the restraining statutes, have been authorised (a); and it is, I think, a reasonable, if not a necessary, inference from this provision, that the legislature intended by this Act to authorise all such sales to be made, for the redemption of the Land-tax, with the consent required, as could have been made for any purpose with the like consent before the passing of the restraining statutes, and, therefore, intended to authorise a sale by a prebendary in his corporate character to the prebendary in his individual character, if such sale could have been made before the passing of those statutes, of which I apprehend no reasonable doubt can be entertained. The case stands thus upon the statute 38 Geo. 3, c. 60. We come to the statute 39 Geo. 3, c. 21, which, by section 2, introduces the Lords Commissioners; and by section 4, provides that the sale shall be under their direction and authority, and, when approved and confirmed by them, or any two of them, shall be as valid and effectual in all respects as if the same had been made and executed in the manner, and under and according to the

(a) Sect. 19—"That nothing therein contained shall extend to authorise any sale, conveyance, mortgage, or grant of any rent charge by any archbishop or bishop, without the confirmation of the dean and chapter, or by any parson, vicar, or other person having any spiritual or ecclesiastical living or benefice, without the consent of the ordinary, and also of the patron, if adult and within the realm, or by any curate of any perpetual curacy, without the consent of the person having the power of appointment to such curacy, or by any master or fellows of

any college, or by any chapter of any cathedral or collegiate church, master or guardian of any hospital, or any spiritual or ecclesiastical person or persons whatever, without such consent as by law was required for that purpose, before the making of any statute or statutes for restraining the sales, conveyances, mortgages, or grants of such persons, bodies politic or corporate, or any of them, or for disabling such persons, bodies politic or corporate, from making any such sales, conveyances, mortgages, or grants, or any of them."

restrictions and regulations contained in the former statutes; and to the statute 40 Geo. 3, c. 30, which makes the like provisions as to mortgages and grants of rent charges; and then to 42 Geo. 3, c. 116, sect. 76, which provides that all sales, enfranchisements, mortgages, and grants shall be made by, with, and under the consent, sanction, control, direction, and authority of the Commissioners; and that no further or other consent, authority, approbation, or confirmation whatever shall be required to enable any such sales, enfranchisements, mortgages, or grants. We have thus the consent of the Commissioners substituted for the consent of the parties whose consent was necessary before the restraining statutes; and surely the sales to which they were authorised to consent must be the same sales to which those parties could have consented. The argument on the part of the Plaintiff upon this point rested upon the ground that the statute 42 Geo. 3, c. 116, giving the power to the prebendary to sell, could not be construed to authorise a sale to him; because it was against the rule of Equity that a party should be put in a position in which his interest would conflict with his duty; and I agree that, where a power of sale is given, without restriction, to a party having a limited interest only, it may well be held that the power to sell imports a negative upon the power to buy, because the power to sell is in the nature of a trust, and it is obvious that the party who is interested to sell cannot, in such a case, safely be permitted to buy. This rule I think may be carried further,—that a restriction put upon the power of sale will not, in all cases, authorise the party to whom the power to sell is given to become the purchaser of the estate which is the subject of the power; but I am not prepared to hold

having a power to sell from becoming the purchaser; so neither, where there is a restriction upon the power of sale, is the party having the power to sell in all cases at liberty to become the purchaser. It must, in each case, depend upon the circumstances under which, and the purposes for which the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power.

In the proportion in which the power is restricted, the danger incident to allowing the donee to purchase is diminished.

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A power of sale given without restriction to a party having a limited interest only, may well be held to import a negative upon the power by the same party to buy, for the power to sell is in the nature of a trust; but as the rule does not extend to prevent, in all cases, a party

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that in no case would this Court permit the party who has the power to sell to become the purchaser of the estate to be sold under the power; and it would be contrary to authority so to lay down the rule. I think it must, in each case, depend upon the circumstances under which, and the purposes for which the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. The objections which, in the case of an unrestricted power, apply with so much force to the donee of the power being permitted to buy, certainly do not apply with the same force in the case of a restricted power. In proportion as the power is restricted, the dangers incident to allowing the donee to purchase are diminished. In the present case for instance, not only have the Lords Commissioners an absolute veto upon the sale, but, under the 74th section, they may require to be furnished with all the information which the donee of the power may possess.

It was argued on this part of the case, that, if the prebendary could purchase, trustees for charities could do so; and this no doubt may be the case: but it is to be observed, that they would not buy from themselves, but from the Lords Commissioners, who are, as I think, by the statute, placed in the position of vendors. It was truly observed by Lord *Eldon*, in one of the cases with reference to a purchase by a tenant for life with a power of sale, that in many instances more might be got from the tenant for life than from any other person; and by what means could that advantage be secured in a case like the present, if the rule contended for by the Plaintiff be maintained? There is here no trust to be executed,—nothing by which the aid of this Court could properly be called in to sanction the purchase, however advantageous it might be.

With respect to the cases which were cited upon the

point, I think that the case of *Greenlaw v. King* (a) has no bearing upon it. In that case there was not, and could not be, any intervention of a third person to check or control the transaction; and with respect to *Grover v. Hugell* (b), although the correctness of the decision in that case can admit of no doubt whatever, it may be observed, with reference to what fell from Sir *John Leach*, that the provisions of the Acts of Parliament do not appear to have been drawn to his attention, and indeed could not usefully have been so for the purposes of that case, and that his observations on what fell from Lord *Eldon* in *Howard v. Ducane* (c), are not perhaps altogether well founded. It is true, that Lord *Eldon* put that case upon the practice of conveyancers; but I think that great Judge was not likely to have sanctioned the practice without considering the principles on which it was founded; and when he states that he should have said originally, that such purchases could not have stood, I understand him to have meant that he would not originally have laid down the principle on which the practice rested; but that he considered the practice to have sanctioned the principle. Upon the whole, therefore, if it had been necessary to decide this question in the present case, I should have held, that, having regard to the purposes for which these Acts of Parliament were passed, and to the special provisions to be found in them, it was competent to Dr. *King*, though intrusted with the power to sell, to become the purchaser of the property which was the subject of the power; but I do not think it necessary in the present case to decide that question. In my opinion, it is unnecessary to do so. The statute 57 Geo. 3, c. 100, contains, in the 25th and 26th sections, the following enactments:—[His Honour read these clauses, see pp. 514, 515, n.] And I think that any objection which could have been raised upon the ground of Dr. *King* being both vendor and

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(a) 3 Beav. 49.

(b) 3 Russ. 428.

(c) T. &amp; R. 81.

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The Court cannot impute to the legislature, in passing statutes confirming titles created by means of parliamentary powers, ignorance of the transactions which had taken place in exercise of such powers.

purchaser, is removed by those enactments. This transaction, as I have reason to know, is by no means an isolated one; and I cannot impute to the legislature, that, at the time when they passed this Act, they were not aware that transactions of this nature had taken place; nor can I by any means adopt the argument which was urged on the part of the Plaintiff, that this Act was intended to confirm the titles of sub-purchasers only. That argument rested for the most part on the words in the recital of the 25th section, "the titles to which as derived under such sales;" but those words may well be construed to have meant that the Act was not intended to operate upon the titles anterior to the sales; and every word of the enactments appears to me to prove that they were so intended; that it was the intention of the legislature to confirm as well to purchasers as to sub-purchasers, is I think apparent from what had been already done. By the 54 Geo. 3, c. 173, s. 12, the legislature had already confirmed the sales under the 42 Geo. 3, and subsequent Acts, in the particular cases there pointed out; and it would not, I think, be very reasonable to suppose that it was intended to leave the purchasers under the previous Acts open to the very same objections against which the purchasers under the 42 Geo. 3, and the subsequent Acts, were protected, or to suppose that the purchasers under the 42 Geo. 3, would not have been excepted in the Act 57 Geo. 3, c. 100, if it had not been intended to operate as to them. It must be remembered, too, in construing this Act, that the legislature was dealing with sales made under the superintendence of public officers appointed for the purpose of carrying out the Acts.

Assuming, then, that *Dr. King* had the right to purchase under the Act, it remains to be seen whether the case of fraud alleged by this bill has been made out; for, if it be proved that there was fraud upon the Lords Commission-



ers in the transaction of the purchase, I think it would be the duty of this Court, by any means within its power, to rectify the fraud. Fraud vitiates every transaction; and if the purchase was obtained by fraud, it was in effect no purchase, and cannot, I think, acquire any validity from the confirming statutes.

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For the purpose of determining this question of fraud, I have felt it to be necessary very carefully to examine in detail the documentary and parol evidence which has been adduced in this cause. The documentary evidence may be conveniently divided into several branches: first, the correspondence anterior to the proposal of 1806; secondly, the documents connected with that proposal; thirdly, the correspondence between the period when that proposal was carried in, and the proposal of 1808; fourthly, the documents connected with the proposal of 1808; and fifthly, the subsequent correspondence and documents.

A purchase obtained by fraud would be, in effect, no purchase, and could not acquire any validity by the confirming statutes.

As to the first branch, the correspondence anterior to the proposal of 1806:—It is true that the early letters refer to *Dr. King's* interest in the redemption of the land-tax, to the advantages he would gain by it, and to the sale of the property in connection with his interest and advantage. But it is to be observed, that *Dr. King* had an interest in all these matters quite independently of any idea of becoming himself the purchaser of the property, and the letters which refer to his interest and advantage are anterior to *Leigh's* letter to him of the 19th of July, 1805; from which it is clear, that it was then contemplated that the right of pre-emption was in the grantees of the copyhold; and that *Dr. King* was to purchase only what those grantees might not immediately take off. It is not until the 25th of March, 1805, that *Dr. King* appears to have been informed, through *Mr. Young*, the secretary of the Commissioners, that the right of pre-emption was in

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the lessee; and it is I think from this date we must consider him as having seriously contemplated the purchase of the property. Looking at this branch of the correspondence from that date, I think it shews that Dr. *King* was acting throughout under the direction of Mr *Young*; and that, so far from proving any intended fraud on the part of Dr. *King*, it evinces a most anxious desire on the part both of Mr. *Kingdom* and Mr. *Leigh*, who were acting for him, to observe the most perfect accuracy in all the details of the transaction. The fair conclusion, as I think, from this branch of the documentary evidence, is, that the transaction had not for its inception any fraudulent design, or any design to profit by taking any undue advantage in the purchase of the property.

As to the second branch of the documentary evidence, the documents connected with the proposal of 1806:—It appears, that, before this proposal was carried in, a most laborious and minute survey of the property in question had been made by Mr. *Kingdom*; who is admitted, by the evidence on the part of the Plaintiff, to have been a surveyor of eminence and respectability, and who seems to have made a previous survey of the prebendal estate upon the occasion of the treaty for the purchase of the lease of 1789. This survey fixed the annual value of the property proposed to be sold at 338*l.* 0*s.* 8½*d.*; and it appears, also, that before this proposal was carried in Mr. *Kingdom* had drawn up, and sent to Dr. *King*, another paper, in the nature of a supplement to the document “R.” (being the document No. 517), in which he had estimated the reversion at 2386*l.* 1*s.* 3*d.*; for this appears to be the correct sum, although on the face of the paper it is cast up at 2468*l.* 1*s.* 11*d.* I do not find, however, any evidence upon the subject of this paper beyond the paper itself, and the letter of the 27th of January, 1806, which is supposed, and as I think (although it is mere speculation) correctly supposed to refer

to it. The memorial now under consideration purports to propose that *John King* should become the purchaser of the property for 2253*l.* 0*s.* 5*d.* This memorial is in some points impeached by the Plaintiff. He says that it untruly represents the lease to be in settlement; and that it is untrue also in representing that the whole of the property was or might be granted by copy of court roll for five lives, as appears by the affidavit annexed; but in another point of view, this memorial is the staple of the Plaintiff's case: for he says, that it proves the value of the prebendary's interest in the reversion to have been 2253*l.* 0*s.* 5*d.*, exclusive of the rights and interests of the lessee or lord farmer. I think no weight is due to the observations which were made in impeachment of this document; for the statement, that the lease was in settlement, was in answer to a printed form of requisition, the object of which was to ascertain whether the lease was, or not, the absolute property of the lessee. And, as to the right to grant by copy for five lives, I think the evidence in this cause as to the custom of the manor fully establishes that right. It is true, that some tenements, called *Grant's* tenements and *South Chullick*, had been granted out upon common law leases; but those leases were granted by persons having partial interests, and could not therefore destroy the custom which had prevailed in the manor. The important question upon this document is, whether the 2253*l.* 0*s.* 5*d.* did or did not include the interest of the lessee or lord farmer. It was most confidently argued on the part of the Plaintiff, that it did not. That argument was mainly founded upon the paper No. 517, in which Mr. *Kingdom*, after stating in one column the value of the reversion after the then present existing lives, states in the two next succeeding columns (O. and P.) the respective values to renew a third life, and to renew two lives after three; and then in another column carries out the value of the reversion corrected. It was argued, that the sums in the columns O.

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and P. represented the interest of the lessee or lord farmer; but I am of opinion that this conclusion is altogether erroneous, and that the 2253*l.* 0*s.* 5*d.* included the interest of the lessee or lord farmer. What the sums in the columns O. and P. really represent, is, in my opinion, this: the sums which the then tenants would pay for the addition of one life to the two already existing, and for the further addition of two lives after the three were filled up; but the value of the lessee's or lord farmer's interest would be not merely what the then tenant would pay for these additions, but what they and succeeding tenants would pay for any additional lives which might be granted at any time during the continuance of the lessee's or lord farmer's interest. Mr. *Rolt*, dealing with this matter in his argument, said, that, admitting that the value of the lord farmer's interest in respect of his right to fill up five lives in the event of any life expiring during the existence of his lease was included in the 2253*l.* 0*s.* 5*d.*, this interest of the lord farmer was valueless and inappreciable; but I cannot assent to that position. I think it was of considerable value, although the actual value of it would be difficult to calculate. That the lord farmer's interest was included in the 2253*l.* 0*s.* 5*d.* appears to me to be clear from this, that the reserved rents were taken at twenty-five years' purchase, and the prebendary's interest in them in reversion on the lease of 1804, could not possibly be of that value. The only other document which I find in immediate connection with the memorial of 1806, is the document Y.,—the instructions for *Kingdom's* affidavit, which does not appear to me to require any comment. I should observe, however, before parting with this part of the documentary evidence, that it is a circumstance open to suspicion, that Dr. *King*, having in his possession this appendix of *Kingdom's*, in which he valued the reversion at 2386*l.* 1*s.* 3*d.* (which as before observed is the correct sum), should have proposed to become the purchaser at the sum

of 2253*l.* 0*s.* 5*d.*; but, on the other hand, it is to be observed that his proposal proceeds on an annual rental of 388*l.* 0*s.* 8½*d.*, although this appendix makes the annual rental somewhat less than 387*l.*; and it seems probable, therefore, that for some reason, which cannot now be explained, this paper was not adopted or acted upon; and at all events I think, that, at this distance of time, and after the deaths of the parties who might have explained the matter, the Court could not have acted upon the suspicion which arises from this circumstance, even if the transaction of 1806 had been the final transaction; and far less do I think that the Court would be justified in carrying the suspicion thus introduced in the case from the transaction of 1806 into the subsequent transaction of 1808; and upon the whole, therefore, I think that this branch of the documentary evidence does not advance the Plaintiff's case.

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As to the third branch of the documentary evidence, the correspondence in the interval between the proposals of 1806 and 1808:—The early letters relate to the affidavit as to the custom of the manor, a question of which I have already disposed; but these letters are of some importance, as shewing that the Commissioners required to be satisfied by the proper evidence; and that Dr. *King* was still in communication with Mr. *Young*, their secretary. The more important part, however, of this branch of the evidence, is that which relates to the withdrawal of the proposal of 1806. It appears, that, after that proposal had been accepted, Dr. *King* claimed to be entitled by virtue of his lease to five-sixths of the surplus of the purchase monies beyond what would be required for the redemption of the land-tax; and, this claim not having been acceded to, he then withdrew the proposal: and from this it is argued, that Dr. *King* then valued the interest of the lessee only at five-sixths of this surplus; but I think the facts do not warrant this conclusion. Dr. *King* had sold for the express pur-

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pose of redeeming the land-tax, and he could not therefore claim back the money which was required for the redemption; and it is not to be wondered at that he did not claim, if, in fact, he did not claim (and we have no evidence upon the subject, except the letter and bill of costs of *Mr. James*), money which he himself estimated as the value of what belonged to the prebendal estate. His claim to five-sixths, however, is important, as shewing that at this period he estimated the interests of the lessee and the prebendary to be in the proportion of five-sixths and one-sixth, and as conveying to the Commissioners' knowledge that he claimed to be interested in the lease. I cannot, therefore, agree with the Plaintiff's conclusion against *Dr. King*, so far as it is founded on this branch of the evidence.

As to the fourth branch, the documents connected with the proposal of 1808:—The most important document to be here considered is the proposal itself. In the proposal, we find the value of the prebendary's reversion calculated at six years' purchase of one-sixth of the annual value of the premises and of the chief rents and heriots. It was said, that there was no evidence to shew that this was the proper mode of estimating the value of the prebendary's interest. But it is clear how this value was estimated. It was taken at six years' purchase on the annual value to the lessee, and this I apprehend is a fair price for a reversion on three lives. It is (as appears from *Scriven on Copyholds* (a),) the price which the Copyhold Enfranchisement Commissioners (basing their calculation upon the transactions under the Land-tax Redemption Acts), have set upon the enfranchisement of copyholds for three lives. If, therefore, there was any error in this mode of estimating the value of the prebendary's interest, it must, I think, have been in the ascertainment of the annual value of the property to the lessee; but, from the nature of the case, this

(a) Vol. 2, p. 1128, 4th Edit., by *Stalman*.

value could only be ascertained by an average; and the bill does not allege that the average taken was unfair. If the Plaintiff intended to found a charge of fraud upon the mode of estimating this value, I think he should in a case of this description have alleged and proved it. The bill, though it impeaches the price paid for the reversion, and assigns some grounds for impeaching it, does not refer to any such ground as this. Surely the Court could not be justified in imputing to the Commissioners that they accepted the proposal without any reason whatever for adopting this mode of valuation. It was said, the court rolls of the manor shewed, that what is called the fineable value of the property was more than one-sixth of the annual value; but this was upon a calculation of the fines for twenty-one years only, which cannot, I think, afford any fair criterion of the value. Another objection which was made upon this proposal was, that it states the land-tax redeemed to be 14*l.* 4*s.* 9½*d.*, whereas, it appears by the certificate of redemption, that this land-tax was in truth only 13*l.* 10*s.* 8½*d.*; but the land-tax here referred to was the land-tax on the property sold, and has therefore very little to do with the case; and the letters of the 30th of May, 1803, shew how this difference arose. I cannot, therefore, assent to the Plaintiff's views upon this fourth head of the evidence.

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As to the fifth and remaining head of the documentary evidence, the subsequent correspondence and documents : —These relate to the subsequent sales by Dr. King; and it was argued from them, that they prove that the property was purchased by Dr. King at a most gross undervalue; but this argument went upon the footing of measuring the share of the purchase money attributable to the ultimate prebendal reversion, either by the annual value of the prebendal interest to the lessee, or by the number of years' purchase given for the prebendal reversion; and I

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do not think that the share of the purchase money attributable to the ultimate reversion can be justly estimated by either of these measures. The annual value of the prebendal interest to the lessee has reference to the interest in possession, and has nothing whatever to do with the value of the reversion; and the six years' purchase given for the prebendal reversion can only be looked at as the value of that reversion taken per se, and affords no measure of the proportion of purchase money which ought to be attributed to it when sold in connection with the lessee's interest.

We come then to the depositions of the witnesses:—Two surveyors, who are examined for the Plaintiff, state the value of the reversion to have been many times greater than the price which was given for it by Dr. King. Two actuaries, who have been examined for the Defendants, estimate the reversion at much less than the price which was given. I have no hesitation in preferring the evidence of the actuaries, who are in the habit of making such calculations, to that of the surveyors, who do not venture in their evidence to fix the value, and give no reason whatever for the conclusion at which they have arrived. We have also the evidence of Mr. Hay, which was relied upon on the part of the Plaintiff as shewing that the Commissioners did not look to the question of value; but I think it by no means bears out that position. What I understand him to say is, that, in cases where the Commissioners approved of the sale, they adopted the surveyor's estimate; but he does not state, and it would be most unjust to the Commissioners to suppose that he could have truly stated, that, in cases where they had any doubt upon the proposal, they acted in blind confidence upon the report of the surveyor, and did not require the further information which, under the Act of Parliament, it was their duty to obtain.



I have thus minutely examined the evidence in this case, because so much reliance was placed upon it on the Plaintiff's behalf; but I think that very little of it has any substantial bearing on what, in my judgment, is the real question at issue in this cause. The Lords Commissioners were satisfied with the proposal made by Dr. *King*, and, apart from the question of his capacity to purchase, I think the point to be tried is, whether any fraud or deception was practised upon them. The Plaintiff has alleged this to have been the case, and that the Bishop also was deceived; but in my opinion he has failed in proving the case. It was argued on his part, that the transaction was so fraught with irregularities, that fraud must be presumed; but I see no irregularities which could justify the inference of fraud; and if the irregularities were greater than they are, I think that it would be most unjust to draw from them the inference of fraud at this distance of time, and when many of the documents relating to the transaction have probably been lost. The bill, for instance, alleges that there was no surveyor's affidavit; but Mr. *King*, in his evidence, says he has no doubt that there was. It is not, however, now forthcoming. It is to be observed, also, that there are documents proved by the Plaintiff to have been obtained from the Land-Tax Office, which have not been produced by him.

Another point which has been raised by this bill is upon the validity of the lease of 1804. I entertain no doubt upon this point. It is true there is evidence that the lease of 1789 was not assigned until after the date of the lease of 1804, and of the indorsement of the livery of seisin upon it; but, looking at the other evidence in the cause, I think it clear that the lease of 1804 was not executed until after the assignment and surrender of the lease of 1789; and one of the letters of October, 1804, proves, I think, that livery of seisin was at the time given; a fact,

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Effect of length of time elapsing between the transactions complained of and the institution of a suit for relief against them, where the fiduciary character on which the title to relief is founded has de facto ceased for a long period, evidence has been lost, and it has become impossible to restore the Defendant to the same position as he would or might have been in, if the suit had been promptly brought.

however, which, even in the absence of all evidence, I should not have hesitated to presume.

The case standing thus upon the merits, it is not perhaps necessary to go further, particularly having regard to the allegations of fraud contained in this bill, and to the now established rule of the Court as to cases in which fraud is alleged, and the Plaintiff fails to prove it. But irrespective of the merits of the case, I think that the length of time which has elapsed presents a most serious objection to the Plaintiff's case. It is not the rule of this Court, that a transaction which can be impeached in its inception, can be impeached at any distance of time. This is not a case of direct trust in *Dr. King*. So far as he could be affected by any relation of trust or confidence, that relation de facto ceased upon the sale to him being completed. He from that time ceased to hold as prebendary, and thenceforth he and those claiming under him have held as owners.

The Lords Commissioners whom the legislature empowered to deal with the property were parties to the sale. The sale was in 1808, and the bill is filed in 1848 to impeach it. It was not questioned by the Defendant *Keene*, the immediately succeeding prebendary. The Plaintiff's title to impeach it accrued in 1833; and it is proved that ever since that time he has been in receipt of the 17*l.* per annum land-tax, for the redemption of which the property was sold, and has received it with full knowledge that the property was sold for the purpose of such redemption. It is said he did not know the circumstances attendant upon the sale: the discovery of the papers in the Land-Tax Office is alleged as an excuse for the delay in the proceedings; but that discovery was not made till the year 1850, and cannot therefore have been the cause of the delay. That delay has been of no trifling consequence. One at least of the

parties who could have given an account of this transaction (Mr. *Young*) had died in the meantime; and supposing the Plaintiff to have been within the equity of the confirmation act, and to have had five years from the time when his title accrued to assert that title, the means which that Act afforded of doing complete justice to the Plaintiff, without at the same time doing injustice to the Defendants, have been lost. Under these circumstances, I think I should not be going too far in holding that this bill ought to be dismissed upon the ground of length of time only. At all events, I am of opinion that it ought to be dismissed; and as to the costs, I think that I cannot in justice refuse them.

Some bills of costs and letters, which were produced on the part of the Defendant *William King*, were objected to by the Plaintiff, and read de bene esse only. I have looked into the cases upon the subject, and am of opinion that the evidence was admissible, although I have not found it necessary to rely upon it.

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*Judgment.*

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Relief, on the principle of correcting abuses of confidence, given against the liability of the maker of a promissory note, taken from a poor patient on the occasion of a change in his position in life, by his medical attendant, without any account having been rendered, and for an amount beyond what was due for his attendance, on the most extravagant scale of charges.

If the right to a benefit taken by a person in a confidential situation be questioned in equity, and it is sought to be sustained as an exercise of liberality, it must be shewn that it was

the intention of the party from whom the benefit emanated to be liberal; but intention imports knowledge, and liberality imports the absence of influence, and the onus of establishing a gift in such circumstances rests with the party who has received it.

The bill sought to restrain the Defendant from proceeding to recover the amount of a promissory note for 32*l.*, on two grounds: first, that the Plaintiff had signed it in the belief that it was for 2*l.* only; and, secondly, that it was given by the Plaintiff, the patient, to his medical attendant, on the occasion of an accession of fortune to the family of the patient, without any account delivered, and for an amount more than would be due for medical attendance, on the most extravagant scale of charges; and the Court, on proof of the circumstances constituting the second ground of relief—*Held*, that the Plaintiff was entitled to a declaration that the note should stand as a security only for the amount due for medical attendance on the Plaintiff, although the case of the Plaintiff as to the first ground of relief sought by his bill was wholly disproved.

That the Plaintiff in equity having an equitable as well as a legal defence to the action on the note, and having filed his bill, was not bound to go into evidence at the trial at law to establish his legal defence, but might rely on his case in equity.

## BILLAGE v. SOUTHEE.

**T**HE bill was filed for the cancellation of a promissory note for 32*l.*, given by the Plaintiff to the Defendant, and for an injunction to restrain the negotiation of the note and proceedings at law upon it.

The Plaintiff was, from the year 1840 to 1848, a shoemaker at *Cambridge*, in a small way of business; and the Defendant was a surgeon in the same town. From 1840, the Plaintiff appeared to have required constant medical and surgical attendance, and to have employed the Defendant almost continuously. In 1843, the Plaintiff had become indebted to the Defendant for his services and attendance; and the Defendant sued him in the Borough Court of *Cambridge*, and recovered the amount which was then due. The Plaintiff still continued, however, to employ the Defendant, until 1848, when, the Plaintiff's daughter being about to marry a nobleman of high rank, he left business, and quitted *Cambridge*. It was upon the occasion of the Plaintiff's thus leaving *Cambridge*, that the note in question was given.

The statement made by the bill was, that, during the time immediately preceding the departure of the Plaintiff

from *Cambridge*, he had had but little occasion for the Defendant's services, and his bill of charges for such period had not been delivered, but the amount justly due for such period could not have exceeded 25*l.*; that, during the employment of the Defendant as the Plaintiff's medical attendant, the Defendant's bill did not exceed 30*l.* or 40*l.* a year, and was generally about 25*l.*; that, in February, 1848, in the morning of the day when the Plaintiff left *Cambridge*, he called on the Defendant, and informed him that he was going to reside in *London*; that the Defendant thereupon said, he must have a settlement of his account; upon which the Plaintiff asked what the amount was, and the Defendant replied that he did not know exactly, but he supposed it was about the usual sum, and that he wished to have a bill or note for the amount; which the Plaintiff said he was willing to give; that a promissory note was drawn up by the Defendant, and placed before the Plaintiff for his signature; that the Plaintiff then fully believed and understood, from the representations then made to him by the Defendant, that the promissory note was for the sum of 25*l.* only; and that the Defendant then distinctly stated to the Plaintiff, that the note was intended as a security only for the sum then justly due and owing from the Plaintiff to the Defendant as his medical attendant; that the Plaintiff was an illiterate person, and not accustomed to read or understand written documents; and that he did not read over or examine the note before signing it, but signed it upon the faith of the Defendant's representations, and in the belief that the note was for 25*l.* only, and was merely intended as such security; that the Plaintiff was ignorant whether the note was dated, or the amount filled up, when he signed it, but he had since discovered that it had been then or subsequently filled up, and was now dated the 1st of March, 1848, and was for 325*l.*, with lawful interest, and was expressed to be for value received; that, at the time when the Plaintiff signed the note, no account of charges

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for medical attendance was made out or delivered; and that whatever sum there was then justly due for such attendance, was considerably less than 325*l.*, and did not in fact exceed 25*l.* or thereabouts, at the utmost.

The bill alleged, that the signature of the Plaintiff to the note was, in manner and under the circumstances aforesaid, obtained by the fraud and deceit of the Defendant; and that the Plaintiff had never received any consideration for the same, beyond the amount then justly due to the Defendant as his medical attendant.

The answer of the Defendant stated, that the Plaintiff, on the occasion of his leaving *Cambridge*, called on the Defendant, and stated the change about to take place in his circumstances on the marriage of his daughter, and at the same time expressed his obligations to the Defendant for his skilful and constant attention and care, and his desire to recompense the Defendant for his medical services; that the Plaintiff called on the Defendant on the 1st of March, 1848, for the express purpose of giving the Defendant a promissory note in payment of the amount due to him; that, after the Defendant had named 500*l.* as a proper remuneration for his services, and the sum had been discussed, 325*l.* was expressly fixed upon and agreed to by the Plaintiff; and the note was thereupon made out for that amount, and the Plaintiff read over and understood, and signed the same, in the presence of the Defendant's servant, who attested his signature. In reply to an interrogatory in the bill, the Defendant, in the schedule to one of his answers, gave an account which commenced in the year 1840, and in which he charged the Plaintiff half a guinea for each visit, besides medicines, the visits being frequently daily visits for several months together. In another schedule to the answer, he also gave an account of sums which he had received from the Plaintiff.

There was no direct evidence in the cause as to what passed at the time the note was given, except the evidence of *Willows*, the Defendant's servant, who was examined on the part of the Defendant, who stated, that, his master's bell having been rung, he went into the parlour, where he saw the Plaintiff and Defendant together; that he was desired by his master to go and purchase a promissory note stamp for 325*l.*, and 1*l.* was given him to pay for it; that he fetched the stamp accordingly, though he did not know how much he paid for it; that, after he had given the stamp to his master, the bell was again rung, and on entering he found his master filling up the promissory note; that his master read it aloud, and handed it to the Plaintiff, who read it, said it was all right, and signed it; that, by the desire of his master, he (the deponent) signed it; that his master's visiting-books were in the room, but he did not see them referred to on that occasion; and that he heard the Plaintiff say, on leaving the house, that he would send 40*l.* or 50*l.* in a month, and the remainder as soon as possible; and that he had heard him on other occasions say he would send the interest in a fortnight; and that he owed his life to the Defendant. This witness, and several others on the part of the Defendant, proved very frequent attendances by the Defendant upon the Plaintiff throughout nearly the whole period from 1840 to 1848. On the other hand, it was proved on the part of the Plaintiff, that the charges contained in the schedule to the answer were exorbitant; and that, assuming the account given by the schedule to be correct, and proceeding upon the footing of the account having been settled to 1843 by the action in the Borough Court, less than the sum of 325*l.* was due from the Plaintiff to the Defendant at the date of the promissory note, after giving credit to the Plaintiff for the sums which were paid by him.

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The Plaintiff brought an action against the Defendant

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upon the promissory note, but, before the trial of the action, the bill was filed. The Plaintiff pleaded to the action fraud and covin, but went into no evidence at the trial, and a verdict was found against him on proof of his signature to the promissory note. On the same morning on which the action was tried, and as it would appear before the trial, an injunction against further proceedings at law was granted by this Court. At the hearing,

Argument.

Mr. Rolt and Mr. Cole for the Plaintiff, relied principally on the equity raised by the bill, that the note should be treated only as a security for what was actually due to the Defendant for his medical services to the Plaintiff, and upon their relative position of surgeon and patient as bringing them within the relation in which the Court would guard one party against the influence of the other. They argued, that the existence of such influence in the circumstances of the case would disentitle the Defendant from taking the note as a payment or settlement of his claim, without reference to its actual amount.—They cited *Dent v. Bennett* (a), *Popham v. Brooke* (b), and *Gibson v. Russell* (c).

Mr. Stuart and Mr. Rogers, for the Defendant, contended, that the suit was founded on an allegation of positive fraud, which was disproved by the evidence; and that in such a case the bill must be dismissed. The Plaintiff must have known the statements of his bill to be untrue; and in such a case he would not be allowed to fall back upon a secondary ground of relief, wholly independent of the fraud: *Wilde v. Gibson* (d). If the Plaintiff had brought forward his case as a question of account alone, the Defendant might have submitted to have had that question

(a) 7 Sim. 539; 4 My. & Cr. 269.

(b) 5 Russ. 8.

(c) 2 Y. & C. C. C. 104.

(d) 1 H. L. Cas. 605.



tried in the action at law, and the prosecution of the suit would have been unnecessary. The Plaintiff could have insisted at the trial of the action on the defence which he now makes, and the Defendant, as payee of the note, would only have recovered the amount actually due to him. The injunction to restrain the action was therefore unnecessary, and in fact prevented the trial of the real question in dispute: *Jones v. Hibbert*(a), *Darnell v. Williams* (b).

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VICE-CHANCELLOR, after stating the facts:—

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The question is, whether the Plaintiff has made out a case for equitable relief. So far as his case depends upon the allegation that he supposed the promissory note to be for 25*l.* only, it is clear that he has not; and the question therefore wholly depends upon the other circumstances of the case.

It was argued on the part of the Defendant, that the case must be considered to have been wholly disposed of by the verdict at law; but if the Plaintiff has an equitable case, it cannot I think have been destroyed by the fact of his not having gone into evidence at law. He had a right, if he thought proper, to rely upon his equitable case, and to permit the verdict to go against him at law. The question therefore falls to be determined upon the merits, taking the Plaintiff to have been fully aware that the promissory note was for 325*l.*

The case in this respect is: that a medical attendant has taken from a poor patient a promissory note for an amount beyond what was due to him, upon the most ex-

(a) 2 Stark. 304.

(b) Id. 166.

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*Judgment.*

traordinary scale of charges, and this at a time when the patient's position in life was about to be changed. I am of opinion a Court of equity will not permit this. No part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and in my opinion this part of the jurisdiction of the Court cannot be too freely applied, either as to the persons between whom, or the circumstances in which it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustees and cestui que trust—guardian and ward—attorney and client—surgeon and patient—to be merely instances of the application of the principle.

In this case there can be no doubt that a relation of confidence subsisted, and there can be equally little doubt that advantage has been taken of that confidence. Why was the amount of the debt which was due from the poor man to be altered, because his position in life was about to be changed? And why was the alteration to be made without any account being rendered, or any explanation being offered? It is said, that he intended to be liberal, and that this Court would not prevent him from being so: and no doubt it would not if such were his intention; but intention imports knowledge, and liberality imports the absence of influence; and I see no evidence in this case either of knowledge or of the absence of influence: and where a gift is set up between parties standing in a confidential relation, the onus of establishing it by proof rests upon the party who has received the gift.

I am of opinion, therefore, that this transaction cannot stand; but the Defendant is of course entitled to be paid what was justly due to him; and I think that the Court, taking jurisdiction over the case, is bound to secure him that amount.

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The decree declared the promissory note a security for what was due from the Plaintiff to the Defendant; and directed an issue on the question, whether the Plaintiff was, on the 1st of March, 1848, indebted to the Defendant in the sum of 325*l.*, with liberty to indorse on the *postea* the amount which the jury should find to have been due; and reserved further directions and costs.

HAKEWELL v. WEBBER.

March 16th.

THE Defendant did not appear.

Mr. *Glasse* and Mr. *Dickinson*, for the Plaintiff, proposed to take such decree as the Plaintiff could abide by.

The VICE-CHANCELLOR said, that, since the General Orders of August, 1841, which deprived a Defendant making default at the hearing of a day to shew cause (*a*), the practice had been for the Court to hear the cause in such a case, and make such a decree as the Plaintiff was, upon the pleadings and evidence, entitled to.

The case of *Hayes v. Brierley* (*b*) was afterwards referred to, by which it appeared that the Lord Chancellor of *Ireland* had adopted this practice, and had expressed his opinion that the same rule would be pursued in *England*.

Since the General Order XLIV. of August, 1841, which directs that the decree against a Defendant, who makes default at the hearing, shall be absolute in the first instance, without giving him a day to shew cause, the practice has been, notwithstanding the default of the Defendant, to hear the cause and make such a decree as the Plaintiff upon the pleadings and evidence is entitled to, and not as theretofore

to allow the Plaintiff to take such a decree as he can abide by.

(*a*) General Order XLIV. of August, 1841. (*b*) 3 Dru. & War. 274.

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12th & 18th.

An agreement made upon the occasion of the intended transfer of a mortgage, that the interest of the mortgage-money, at 5*l.* per cent., (to be reduced to 4*l.* per cent., if paid within a limited time), should run from the date of the proposed transfer, being the date of the deed of transfer, although, owing to the mortgagor being then unprepared to procure the execution of that deed, the mortgage-money, which was then ready to be advanced, was not actually advanced until a subsequent time:—*Held*, not to be usurious,—less than 5*l.* per cent. having, in fact, been taken, the transaction being *bonâ fide*, and there having been no absolute reservation of more than 5*l.* per cent., but only a reservation from the burden of which the mortgagor might, at his option, have discharged himself.

A mortgagee, after filing a foreclosure bill, unsuccessfully moving for a receiver, and rendering himself liable to the costs of the motion, died, and his executors, without reviving the suit, filed a new bill for foreclosure of the same estate:—*Held*, that the Defendants, not by plea to the new bill insisting upon the former suit, but claiming by their answers the benefit of the objection as if they had pleaded it,—the Court would not refuse the decree in the second suit, or stay the proceedings therein until the former costs should be paid.

That the Court, not approving of the course taken by the Plaintiffs, would give them no costs of the second suit, unless they submitted to pay the costs to which the mortgagee was liable in the first suit.

## LONG v. STORIE.

A BILL of foreclosure, brought by the executors of Captain *Long*, who was a mortgagee of the advowson of the vicarage of *St. Giles, Camberwell*, against the Rev. *J. G. Storie*, the vicar and mortgagor, and divers persons, who claimed interests subsequent to the mortgage to Captain *Long*. Several of the Defendants sought to avoid Captain *Long's* mortgage, on the ground that it was created in such a manner as to bring it within the statute against usury. Others of the Defendants also raised an objection to the relief in this particular suit, on the ground of the existence of another suit, which had been instituted by Captain *Long* himself, for the same matter, and which abated by his death, and was still undisposed of; or, if any relief should now be given, they insisted that it ought to be qualified by imposing, as a condition, that the executors should pay the costs of their testator's suit.

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*Mr. Bethell* and *Mr. Bazalgette* for the Plaintiffs.

The *Solicitor-General*, *Mr. Rolt*, *Mr. Pitman*, and *Mr. Tripp* for the Defendant *Storie* and different mortgagees or incumbrancers subsequent to the Plaintiff.

*Mr. Kenyon Parker*, *Mr. Headlam*, *Mr. T. Hall*, *Mr. Schomberg*, *Mr. Hallett*, *Mr. W. Rudall*, *Mr. J. H. Palmer*, *Mr. Grove*, *Mr. Osborne*, *Mr. Prior*, *Mr. Murray*, and *Mr.*

*A. Smith*, appeared for other Defendants, who, by having recovered judgments against *Storie*, or entered into contracts with him or otherwise, were suggested to have interests in the mortgaged property.

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 Argument.

The arguments and authorities cited appear in the judgment.

VICE-CHANCELLOR:—

Feb. 18th.  
 Judgment.

Several points were reserved for judgment in this case. The first was a question of usury. The Rev. *J. G. Storie*, the Vicar of *Camberwell*, being seised of the advowson of the vicarage, mortgaged it first to the *Norwich Insurance Company* for 7500*l.*, and then to *Cockell* for 5000*l.* In the year 1844, Captain *Long* agreed to advance 12,500*l.* on these mortgages being transferred to him. On the 29th of March, 1844, he paid the 5000*l.* due upon *Cockell's* mortgage and that mortgage was transferred to him; and he was prepared then to have paid the 7500*l.*, and to have taken a transfer of that mortgage also, but the deed for transferring it, though prepared, was not then executed, and the transaction therefore could not then be completed. The deed which had been prepared for transferring this mortgage was made between the trustees of the *Norwich Insurance Company* of the first part, the Defendant *Storie* of the second part, and Captain *Long* of the third part, and purported to assign to Captain *Long* the 7500*l.*, with interest thereon from the date thereof, in consideration of 7500*l.*, expressed to have been paid by him to the *Norwich Insurance Company*; and the advowson was thereby purported to be conveyed to Captain *Long* and his heirs, by way of mortgage, to secure the 7500*l.* and interest at 5*l.* per cent.; and the deed contained a covenant on the part of Captain *Long*, that if 300*l.*, being the interest at 4*l.* per cent., should be paid to him by half yearly payments with-

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in thirty days after they respectively became due, he would accept the same in satisfaction of the interest on the principal sum of 7500*l*.

In this state of circumstances Mr. *Storie* signed an agreement, dated the 29th of March, 1844, which, after reciting the payment by Captain *Long* of the 5000*l*. in respect of *Cockell's* mortgage, proceeded as follows: "And whereas a deed of transfer from the *Norwich* Union Assurance Company to the said *John Long*, of a mortgage debt of 7500*l*., has been prepared, but has not yet been executed; and the said *John Long*, being prepared with the said sum of 7500*l*. (which is a first charge upon the advowson of *St. Giles, Camberwell*) I hereby undertake that the said deed of transfer from the *Norwich* Union Assurance Company shall bear date as of this day; and that interest on the said sum of 7500*l*., according to the rate mentioned in the said deed, shall be calculated and payable to the said *John Long* from this day. I also undertake to execute a warrant of attorney to enter up judgment against me for the said sum of 5000*l*., when required to do so." Here the transaction rested until the 4th of May, 1844, when the transfer of this mortgage was completed, and the money paid over.

It was argued, that the 7500*l*. not having been paid over until the 4th of May, the transaction was usurious and the security void. I am of opinion that the objection cannot be maintained. The statute (*a*) (sect. 1) enacts, first, that no person, after the 29th of September, 1714, upon any contract which shall be made after that day, shall take, directly or indirectly, for the loan of any monies, wares, merchandise, or commodities whatsoever, above the value of 5*l*. for the forbearance of 100*l*. for a year, and so after that rate for a greater or less sum or a longer or shorter time; secondly, that all bonds, contracts, and assurances whatsoever, made after the same time, for

(*a*) 12 Anne, st. 2, c. 16.

the payment of any principal or money to be lent or covenanted to be performed, upon or for any usury, where-upon or whereby there shall be reserved or taken above the rate of 5*l.* for every 100*l.*, shall be utterly void; and thirdly, that all persons who shall, upon any such contract, take by way or means of any corrupt bargain, loan, &c., or by any deceitful way or means, or by any covin, engine, or deceitful conveyance a larger amount of interest than 5*l.* per cent. shall forfeit the treble value.

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*Judgment.*

Now, Captain *Long* did not take more than 5*l.* per cent. interest. He received interest at 4*l.* per cent. from the 29th of March to the 29th of September, 1844, a period of 183 days, which was less than interest at 5*l.* per cent. for 147 days from the 4th of May. There was, therefore, no taking of usurious interest. Then, was more than 5*l.* per cent. reserved?—clearly not by the deed. But it was said, and truly, that the deed was not the entire contract. What, then, was the contract? It is to be found in the agreement of the 29th of March, 1844. The agreement stipulates that the interest shall be calculated at the rate mentioned in the deed, which is 5*l.* per cent., reduceable to 4*l.* per cent. It is, therefore, the same contract, both by the agreement and by the deed, except as to the period from which the interest is to run.

On the face of the contract, then, is there any usury? This question depends on what is the meaning of the word “reserved” in the statute; and the cases establish that it means absolute reservation. A reservation on which more or less than 5*l.* per cent. may be payable at the option of the borrower, is not a reservation of more than 5*l.* per cent. within the statute. In *Floyer v. Edwards* (a), Lord *Mansfield* says (b): “An actual borrowing of money with a pe-

(a) *Lofft*, 595.

(b) *Id.* 599.

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 Judgment.

nalty on forbearance is no usury, if the party borrowing can discharge himself by payment within the time; and that case in *Croke* (a), which says this, is much stronger than this case, by the difference of the penal sum, which is greater." And he refers to the case in *Hawkins* (b), and also to *Burton's case* (c), in which a bargain for a rent of 20*l.* a-year, to cease on the payment of 100*l.*, was held no usury, as it was "in the election of the grantor to have paid the 100*l.*, and to have frustrated the rent." Another important case (not cited in the argument) is *Tate v. Wellings* (d). There the obligor of a bond had applied to the obligee for the loan of a sum of money, which the obligee agreed to let him have, but required the same interest as that which he was then receiving in the Short Annuities, namely, 8½ per cent.: this being assented to, it was agreed that the money should be raised by a sale of Short Annuities to the amount of 912*l.* 12*s.* 6*d.*; and a bond was drawn up, dated the 1st of September, 1784, by which the obligor was to replace the amount in the same stock on the 1st of September, 1785; but if it were not replaced by that time, he was then to repay the sum of 912*l.* 12*s.* 6*d.* on the 1st of January, 1786, and to pay in the meantime such interest as the stock would have produced; and it was held, that, because he had in the first year the option to replace the stock, and so release himself, that saved the ulterior contract, by which after the first year he was bound to replace the principal, and pay interest beyond 5*l.* per cent. Lord *Kenyon*, C. J., said, "I have had some doubt in my mind in the course of the argument, whether, as the defendant had no power to replace the stock after the expiration of the year, it did not become a loan of money

(a) *Roberts v. Tremaine*, Cro.  
 Jac. 507.  
 (b) *Pleas of the Crown*, 247.

(c) 5 Rep. 69.  
 (d) 3 T. R. 531.



from that time, with a reservation of usurious interest, and that the pretence of transferring the stock was merely a colour for the usurious transaction." And he adds, that his doubt was removed by the finding of the jury; and that, if the transaction were legal during the first year, nothing was superadded to make it usurious, the whole being a fair transaction. And *Ashhurst, J.*, says: "It appeared from the evidence, that in substance this was a loan of stock. The agreement was, that the Defendant should have the use of the money which was the produce of the stock, paying the same interest which the stock would have produced, with liberty to replace the stock on a certain day; till which time the lender was to run the risk of the fall of the stocks; but he stipulated, that, if it were not replaced by that time, he would not run that risk any longer, but would be repaid the sum advanced at all events. And from this contract he derived no advantage; for he was only to receive in the meantime the same interest which the stock would have produced. Now, though this might have been used as a colour for usury, it was a question for the consideration of the jury; and they have negatived it."

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 Judgment.

No doubt the case may be brought within the statute, if there be any evasion or contrivance. If, for instance, it was agreed that the money should not be paid at the day, or there were any thing else to indicate that the transaction assumed the shape in which it is found, with a view to secure interest beyond the rate allowed. But every fact in this case contradicts such a supposition. I am of opinion, therefore, that neither in the deed, nor in the agreement, is there any usurious reservation of interest.

In this view, it is not material to consider *Bangley's case* (a); but if it were otherwise, I do not think it would

(a) 1 Rosc, 171.

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apply. In that case, a warrant of attorney was given for securing the repayment of 600*l.*, and interest from the 29th of March; and it did not appear that there was any agreement for the 600*l.* to be advanced at the time the warrant of attorney was given; and the fact of the payments being made from time to time, afterwards tended to shew that such an advance was not intended. But in the present case, the evidence clearly shews, that the 7500*l.* was agreed to be advanced immediately, and that it was not actually done, only because the borrower was not prepared to complete the transaction. In *Bangley's case*, Lord *Eldon* observes, "It has been said, that *Bangley* had the 600*l.* ready; that the bankrupt might have had it; and the case has been assimilated to that of a banker; and if that was in fact the agreement, and the transaction was *bonâ fide*, that the money being paid as it were to the bankrupt, and repaid by him to the lender, or left in his hands to be drawn out as he wanted it, I do not think that the money not being paid at a subsequent day, though a breach of the contract, would affect it with usury." The present case rather resembles the case which is thus put by Lord *Eldon*, than the case which was decided. The case of *Hodgkinson v. Wyatt* (a) clearly does not affect this case.

Independently of these grounds, I much doubt whether, if it were necessary to decide the point, the deed could in any event be held usurious. On looking carefully into the agreement, I am disposed to think that it is a separate contract, referring to the period between the 29th of March and the transfer. And if it be so, the agreement may be usurious and void, and the deed good. This construction may be derived from the position of the parties and the terms of the agreement. Captain *Long* had taken a second mortgage, and the first mortgage remained outstanding. If the transfer of it bore

(a) 4 Q. B. 749.

a subsequent date, the interest would run against the second mortgage; and the stipulation therefore might well be made to prevent subsequent interest so running. If the intention had been merely to make interest payable under the deed from the 29th of March, I cannot see why the second mortgage should have been mentioned.

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 Judgment.

Other objections have been taken to this suit, arising out of these circumstances:—It appears that Captain *Long*, in his lifetime, instituted another suit for foreclosing these mortgages. In that suit a motion was made for a receiver, which was refused, the costs of the motion being reserved. An appeal from that decision was made, and was dismissed with costs. These costs have never been paid. Captain *Long* is dead, and the suit is therefore abated. The present bill, taking no notice of these proceedings, is filed by his executors. It is objected, first, that the proper mode of proceeding by the executors was to have revived the old suit, and that they are not entitled to a decree in this suit; or, secondly, that the executors cannot receive any benefit or relief in this suit until the costs ordered to be paid in the abated suit have been satisfied.

Now, in the first place, let us see what would have been the course if the existence of the first suit had been pleaded in bar to the present suit. I say nothing on the question whether an abated suit can or cannot be pleaded; but if it could have been pleaded, there would have been a reference to the Master to inquire whether the two suits were for the same matter. The benefit of a plea of the former suit is claimed by the answers of some of the Defendants; but if they had pleaded the previous suit it would have been in the power of the Court to deal with both suits according to the justice of the case; and if the second suit had been found better adapted to the justice

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of the case, the Court might have ordered payment of the costs in the first suit, then already directed to be paid, and stayed all further proceedings in it, allowing the second (the present) suit to proceed. If it had been proper to go on with the first suit, the subsequent expenses of this suit would not have been incurred. The existence of the old suit is not necessarily a bar to the prosecution of this suit; and I cannot dismiss this suit on that ground (a).

Then, on the question of the costs of the former suit, it must be observed, the Defendants have allowed all, or nearly all, the expense in the second suit to be incurred before they took the objection, that the first suit is still pending. They have, therefore, not made the proper use of the objection, such as it is. On the other hand, the line of conduct of the Plaintiffs is certainly not such as ought to be encouraged. They might have revived the old suit, and, for all that appears, may have obtained upon it all the relief which they seek by their new bill. The Plaintiff in the old suit had made two motions, of one of which the costs were reserved, and of the other, the present Plaintiffs, as his executors, would have to pay the costs; and in order to avoid that, they file the present bill. This, I think, they had power to do; but as they have thought proper to take that course, I shall give them no costs in this suit, unless they submit to pay the costs in the old suit.

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Mr. *Follett*, for the Plaintiffs, submitted that, inasmuch as some of the Defendants had been paid their costs of the first suit, the usual decree as to costs should be made as to such Defendants.

(a) His Honour mentioned also on this point the case of *Crofts v. Wortley*, 1 Chanc. Cas. 241.

The VICE-CHANCELLOR refused to make any distinction as to costs between the Defendants, and made the usual decree of foreclosure, without any reference as to the priorities of the mortgagees, but without costs.

divers sub-mortgagees and parties having derivative interests under the mortgagor subsequent to the Plaintiff, without any inquiry as to their respective priorities.

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Decree for foreclosure against

BLACKWELL v. PENNANT.

March 5th &  
8th.

MR. PENNANT, the testator, gave legacies to his servants in the following words:—"I give to each of the servants living with me at the time of my decease, and who shall then have lived in my service for three years, one year's wages."

The Plaintiff had for many years been employed by the testator as a gardener, and lived with his family in a cottage belonging to the testator in the grounds, near the mansion-house. The wages of the Plaintiff had been at first 15s. a week, and afterwards 17s., which was paid at irregular intervals; and he claimed the amount of his wages for a year, calculated at the latter rate per week, under the bequest. The widow and executrix of the testator resisted the claim.

The Plaintiff, by his affidavit, alleged that he was hired by the year, and that his yearly wages were calculated, first, at 15s., and afterwards at 17s., per week. The opposing affidavits denied the yearly hiring; and stated that the Plaintiff was, and was always considered as, a weekly labourer, employed in out-door labour, like seven or eight other men and boys who were usually employed in and about the mansion-house and farm; and that, in a book kept by the executrix and her husband in his lifetime,

A bequest of a year's wages to each of the servants of the testator living with him at his decease, who should then have lived three years in his service:—*Held*, not to exclude servants of the testator living in a different house from that in which the testator lived, but to exclude servants not hired by the year; and *held*, therefore, that a gardener, employed at weekly wages, (although paid at irregular intervals), was not entitled to the benefit of the bequest.

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intituled "Servants at *Brymba-house*," the Plaintiff's name did not appear.

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*Argument.*

Mr. *Rolt* and Mr. *Bernard*, for the Plaintiff, contended, that the circumstance that the Plaintiff had not lived with the testator in the mansion-house was not material: *Townshend v. Windham* (a). The decision of Lord *Truro* in *Ogle v. Morgan* (b) had turned on the word "domestics," which did not occur in this will; nor was it material that the annual amount of the Plaintiff's wages was calculated at a weekly rate; it was equally a year's wages: *Nowlan v. Ablett* (c), *Howard v. Wilson* (d).

Mr. *Giffard*, for the Defendant, cited *Booth v. Dean* (e), as shewing that the gift would only apply to family servants usually hired by the year, and commented on the affidavits, as shewing that the Plaintiff had sought to give an untrue colour to the circumstances, in order to support his assertion of a yearly hiring. He also relied on *Ogle v. Morgan*, and cited *Chilcot v. Bromley* (f).

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*Judgment.*

VICE-CHANCELLOR:—

The simple question in this case is, whether the Plaintiff was a servant living with the testator within the meaning of the will. This question, like all others upon the construction of wills, must be determined according to the intention of the testator, to be collected from the words which he has used, taken in connection with the surrounding circumstances,—the Court placing itself in the position of the testator, for the purpose—not of speculating upon

(a) 2 Vern. 546.

(b) 1 De G. Mac. & G. 359.

(c) 2 C. M. & R. 54.

(d) 4 Hagg. 107.

(e) 1 My. & K. 560.

(f) 12 Ves. 114.

what his intentions may have been—but of ascertaining whether the circumstances by which he was surrounded afford any certain indication of his intentions. The only important fact to be gathered from the surrounding circumstances in the present case appears to me to be, that the testator had servants who were hired by the week and paid weekly, and also servants who were hired at yearly wages, and paid quarterly or half-yearly; for, although the evidence shews, further, that there were servants who lived in the house, and also servants who lived in the cottages and lodges about the grounds, as was the case with the Plaintiff, no certain conclusion can, I think, be drawn from that fact, as to whether the testator intended this disposition to extend to one only, or to both of those classes.

The question, therefore, in the view which I take of it, must be determined on the words of the will, coupled with the fact of the testator having had servants hired at yearly, and servants hired at weekly wages. It was argued upon the words of the will, that the expression “living with me,” imports living in my house, and therefore, that no servant who was not living in the house could be entitled under the bequest; but I cannot adopt that construction. The words “living with me,” as applied to servants, may, I think, well be understood to mean living in my service; and this, I am much disposed to think, is the ordinary import of the words: but it is not necessary to go so far in the present case, for here the Plaintiff was actually living in a cottage belonging to the testator, on the grounds adjoining to the testator’s mansion; and it cannot, I think, reasonably be held that he was not living with the testator in the sense in which servants live with their masters, because he was not actually living in the same house with his master. The cases cited from *Vernon*, and from *Haggard*, support this

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Whether the words “living with me,” as applied to servants, should not be understood “living in my service,”  
 —*Quare*.

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A legacy of a  
 "year's wages"  
 cannot properly  
 be construed to  
 mean the aggregate  
 of the weekly wages  
 of a servant for  
 fifty-two weeks.

view, as does also the case of *Ogle v. Morgan* (a), in which the late Lord Chancellor evidently considered that the Plaintiff was a servant in the establishment, though not in the domestic establishment; and *Booth v. Dean* (b) does not appear to me to be opposed to it; for all that Sir *J. Leach* there says is, that the bequest would apply only to family servants; not that only servants living in the house were to be deemed family servants. But that case has in another point of view a most important bearing upon the present. The bequest there, as here, was of a year's wages; and Sir *J. Leach* treats it as clear, that the expression must be construed to refer to family servants usually hired by the year. In that opinion I fully concur. Where a testator gives a year's wages, he must, I think, be understood to mean, that he gives to those whom he has hired at yearly wages. The nature of the gift explains the persons for whom it was intended. To impute to the testator that he intended, by a year's wages, the aggregate of the wages of fifty-two weeks, would, I think, be a most unreasonable and strained construction of the words which he has used. In my opinion, therefore, it was incumbent upon the Plaintiff, in order to entitle himself under this bequest, to make out that he was hired by the testator at yearly wages—that there was an agreement by the testator to pay him a certain sum per annum, as was the case in *Ogle v. Morgan*, where the agreement was for 70*l.* a-year, payable weekly. Whether there was such an agreement or not in the present case is entirely a question of fact; and upon the evidence in this case, I am of opinion that there was not.

The Plaintiff has indeed sworn by his first affidavit that he was hired by the year, first, at 39*l.*, which would be 15*s.* per week, and afterwards at 44*l.* 4*s.*, which would be 17*s.* per week; but he has nowhere sworn that there was

(a) 1 De G. Mac. & G. 359.

(b) 1 My. & K. 560.



any agreement that he should be paid weekly; and, on the contrary, he says that he was paid at first half-yearly, and then quarterly, and then at irregular periods: and to say nothing of the improbability of a yearly hiring at 44*l.* 4*s.*, it is in the highest degree improbable that the testator, having agreed to hire him at yearly wages, and begun to pay him half-yearly and quarterly, should afterwards, without any fresh agreement, and none such is stated, have paid him at irregular times. This is not only his statement, but is proved more strongly by the Defendant; for she produces the Plaintiff's own account books with her, whilst he was in her service after the testator's death: in the first of which, commencing immediately after the death of the testator, he begins by charging for a number of weeks; and in the other of which he for the most part charges and is paid every two weeks. And the Defendant swears that the account kept by the Plaintiff with her was in all respects the same as the account which he kept with the testator. In addition to this, there is the evidence of Mr. *Jones*, who swears that the Plaintiff complained to him that 17*s.* a week was small wages for the support of himself and family, and never suggested that he had been hired by the year; and these facts are not at all met by the affidavit in reply. I am of opinion, therefore, that this claim must be dismissed. If the question had depended upon the law of the case, I should have dismissed it without costs, in consequence of the decision in *Ogle v. Morgan*; but, my opinion being, that the question depends upon the facts, and that the Plaintiff has failed in substantiating his case, I must dismiss it with costs.

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1851.

Nov. 15th &  
17th.

1852.

Feb. 17th.

A. and B., and the son of B., entered into partnership as solicitors, and by articles

agreed—(2) that the partners were diligently and faithfully to employ themselves in carry-

ing on and managing all the professional business in which they or either of them might be employed or concerned; (5) that B. should use his best endeavours to obtain the appointment of the partnership firm to three offices or clerkships, which were then held by B., and such offices should be partnership appointments; (6) that all other compatible offices should be obtained, if possible, in the name of the firm, and the emoluments treated as part of the profits of the partnership; (15) that if B. or his son should retire, or A., or B. or his son should die, the share of the deceased partner should accrue to the surviving partners: that if B. or his son retired, they were to use their best endeavours to secure the practice to the continuing partners, and such retiring partner should practise within 30 miles; (16) that if either partner should not diligently and faithfully employ himself in carrying on the said partnership practice, and should, on receiving monies, bills, notes, &c., knowingly or wilfully omit immediately to make entries thereof, or if A. or the son of B. should absent himself more than two months in one year, the others or other of the partners, if they or he should think fit, should be at liberty to dissolve the partnership, by giving to the offending partner a notice to that effect, and the partnership should from that time, or the time specified in the notice, be dissolved, in the same manner and with the same consequences as if it had determined by the voluntary retirement of the offending partner. B. and his son subsequently procured their own appointment, or the appointment of one of them, to the offices or clerkships, and did not endeavour to procure the appointment of A. It was afterwards discovered that B. was greatly involved in debt, and he absconded in January, 1849, and did not return to the business. In May, 1849, A. served a notice, in the manner pointed out by the articles, on B. and his son, to dissolve the partnership from that date; and he then filed his bill against B. and his son, to have the dissolution declared by the Court, an injunction to restrain them from practising within 30 miles, and a decree that they should resign the several offices or clerkships:—*Held*, that the Plaintiff was entitled to dissolve the partnership as to B., but not as against the other partner (the son of B.), and that he was not entitled to dissolve it by notice under the 16th clause, without the concurrence of his co-partner (the son).

That, B. not having procured or endeavoured to procure for the partnership firm the appointments to the several offices or clerkships, so as to give the plaintiff at the dissolution either a share of the profits of the offices or the chance of competing for them, but such appointments having been procured for B. and his son to the exclusion of the Plaintiff, B. and his son were not to be allowed to retain the offices for their exclusive benefit.

That, inasmuch as, from the nature of the offices, they could not be sold, nor could any manager or receiver be appointed to carry them on, the Defendants ought to be charged with the value of the offices in the partnership accounts.

That, the Plaintiff having given a notice of dissolution (acting under the 16th clause), and his co-partner having adopted it, the partnership should be treated as dissolved from the time of the notice, although not with the consequences attaching to a dissolution under the 15th clause.

That, the consequences of a dissolution under the 15th clause not having attached, the Plaintiff, therefore, was not entitled to the injunction to restrain the Defendants from practising within 30 miles.

## SMITH v. MULES.

THE Defendant, *Philip Mules*, carried on an extensive business as an attorney and solicitor at *Honiton*, and was, in the year 1847, assisted by his son, the Defendant *Horace Mules*, who was also an attorney and solicitor, but was not then in partnership with his father. In the Spring of 1847, the Plaintiff *Smith*, who had been admitted an attorney and solicitor in the year 1846, entered into a ne-

gotiation, through the medium of his uncle, *C. V. Bridgman*, with the Defendant *Philip Mules*, to be admitted into partnership with him; and in the course of this negotiation the business of the Defendant *Philip Mules* was represented by him to be worth 1500*l.* a year, and to be in part made up of stewardships and offices, which were represented to produce 421*l.* a year. Amongst the offices from which this income was represented to be produced were the offices of Clerk to the *Honiton* Turnpike Trust, Clerk to the *Honiton* and *Sidmouth* Turnpike Trust, and Clerk and Registrar to the *Honiton* Poor Law Board, which were represented to produce 205*l.* a year, and there were also the offices of Clerk to the *Honiton* and *Ilminster* Turnpike Trust, and Clerk to the Commissioners of Taxes, and other offices and stewardships. The Defendant *Philip Mules*, in the course of the negotiation, also represented that he was under no pecuniary embarrassment; and the negotiation ultimately terminated in an agreement for the Plaintiff's becoming a partner with the Defendant *Philip Mules*, and having an equal share in the business, upon the terms of his paying the sum of 2300*l.* It was afterwards agreed that the Defendant *Horace Mules* should also become a partner in the business; and finally, articles of partnership were entered into, which were dated the 22nd of June, 1847, and made between *Philip Mules* of the first part, the Plaintiff of the second part, and *Horace Mules* of the third part; and by these articles, after reciting that *Philip Mules* had for some years been in a considerable and lucrative practice as an attorney and solicitor in *Honiton*, and had obtained and then held the several offices and appointments of Clerk to the Trustees of the *Honiton* Turnpike Trust, Clerk to the Trustees of the *Honiton* and *Sidmouth* Turnpike Trust, Clerk to the *Honiton* Poor Law Union, and Registrar of the said Union; and that in consideration of 2300*l.*, which had been paid by the Plaintiff to *Philip Mules*, and of the natural love and af-

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fection of *Philip Mules* for *Horace Mules*, his son, he *Philip Mules* had agreed to admit the Plaintiff and *Horace Mules* into partnership with him in the said practice, and in the emoluments of the said offices; and that it had been agreed between them to regulate the terms and conditions of the partnership in the manner hereinafter expressed: the parties mutually covenanted—1st. That the partnership should be carried on under the name of *Mules, Smith & Mules*, from the date of the deed, for the lives of the partners, or of any two of them. 2nd. That they and each of them should and would diligently and faithfully employ themselves in carrying on and managing all suits at law or in equity, conveyancing, clerkships, stewardships, and receiverships, and all and every other professional business, which they or either of them might be employed or concerned in during the partnership, and that all the partners should communicate to the others and other of them, upon request, all instructions and information concerning the practice. 4th. That 500*l.* should be the capital of the partnership, and should be forthwith paid into the banking-house of *Flood & Lott, Honiton*, to the credit of the partnership,—one moiety by *Philip Mules*, and the other moiety by the Plaintiff. 5th. That *Philip Mules* should forthwith use his best endeavours to obtain the said several offices or appointments of Clerk to the Trustees of the *Honiton* Turnpike Trust, and also of Clerk to the Trustees of the *Honiton* and *Sidmouth* Turnpike Trust, and also of Clerk to the *Honiton* Poor Law Union, and also of Registrar of the said Union, respectively, to be made and given to the said partnership firm; and that forthwith, from the date of this deed, all the said several offices and appointments should, as between the partners, be considered and treated as partnership offices and appointments; and that *Horace Mules* should, from the same date, attend to the duties of the said several offices and appointments, the same to be conducted at the offices of the

partnership for the time being; and that so long as *Philip Mules* should remain in the partnership, *Horace Mules* should receive the several salaries, fees, and emoluments of the said offices and appointments, to and for his own benefit, in full discharge of all share of the partnership profits; but that when *Philip Mules* should retire from the partnership, or should die, the several salaries, fees, and emoluments should become divisible in the same manner as all other the partnership profits should be divided. 6th. That as to all other public offices compatible with the partnership, and which either of the partners should desire to obtain, the same should be obtained, if practicable, by and in the name of the partnership; and that *Philip Mules* the Plaintiff, and *Horace Mules*, should respectively attend to the duties of all such public offices and appointments as they or either of them might hold or acquire during the partnership; and the emoluments to be derived from all such last-mentioned offices and appointments should be considered as a part of the gains and profits of the partnership practice, and should be divided accordingly in manner thereafter mentioned. 7th. That *Philip Mules* and the Plaintiff should each be entitled to one half share of the gains and profits. 10th. Monies, bills, notes and securities, received on account of the partnership, to be handed over to the Plaintiff as cashier, and entered in the proper books, and the Plaintiff alone to make payments by cheques on the bankers, so long as *Philip Mules* and the Plaintiff should mutually determine. 11th and 12th. As to the mode of keeping and making entries in the books, and settling the accounts. 13th. That *Philip Mules* should be at liberty to assign any part of his share in the partnership to *Horace Mules*, who, during the continuance of *Philip Mules* in the partnership, should be interested in such share as a sub-partner therein only; and that, upon the retirement or decease of *Philip Mules*, the salaries, fees, and emoluments of the said several offices and

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appointments should cease to be exclusively apportioned to *Horace Mules*, but the whole thereof should merge in and constitute part of the general profits of the partnership; and the whole of such general profits, including such salaries, fees, and emoluments, should be equally divided between the Plaintiff and *Horace Mules*; who should from thenceforth continue the said partnership practice upon the terms of the deed, so far as the same should be applicable to them as partners equally interested. 14th. That *Philip Mules* should not be at liberty to retire from the partnership for three years, but might retire after that time, upon giving six months' notice; the Plaintiff and *Horace Mules* to be at liberty to retire upon giving three months' notice. If the Plaintiff should die within two years from the date of the deed, *Philip Mules* to pay to the Plaintiff's executors 1000*l.* in full for or in respect of the 2300*l.* 15th. That in the event of the retirement of *Philip Mules* and *Horace Mules*, or either of them, or upon the death or deaths of them or either of them, *Philip Mules*, the Plaintiff, and *Horace Mules*, the share or shares of such partner or partners retiring or dying should accrue and survive, as the case might be, to the continuing or surviving partners, in equal moieties, subject as aforesaid; and in case of the retirement of *Philip Mules* and *Horace Mules*, they should respectively use their best endeavours to secure to the continuing partners or partner all the said partnership practice, and all offices and appointments, as well of the partnership or of either of the said partners, save only such offices as *Horace Mules* should or might obtain incompatible with the said professional practice, and which he should retain; and in such case of retirement as aforesaid, such retiring partner should not, for the period of twenty years thereafter, practise as an attorney or solicitor, or aid in any such practice, within a distance of thirty miles from *Honiton*. 16th. That if, contrary to the several stipulations in this deed, either of the partners should not (not

being prevented by illness or unavoidable accident,) diligently and faithfully employ himself in carrying on the partnership practice, or should, either alone or in partnership with any other person, enter into any other profession or trade or occupation, or should transact business, or enter into any contract with or give credit to any person, or lend or advance any sum of money, goods, or effects, out of the said partnership funds or effects, to any person after he should have been requested not to do the same respectively, or should compound and release or discharge any debt, or sign any letter of license, or any other instrument as aforesaid, or should knowingly commit or permit any act, matter, or thing whatsoever, by which or by means of which the said partnership monies or effects could, should, or might be seized, attached, expended, or taken in execution, or should not, as often as he should receive money, bills, notes, or other securities, immediately thereupon make or cause to be made due entries thereof in the proper books of account belonging to the said partnership, and should knowingly or wilfully make such omission, or if either of them, the Plaintiff and the said *Horace Mules*, should, unless prevented by illness or unavoidable accident, absent himself from the said practice for any period or periods exceeding in the whole in any one year two calendar months, then and in any or either of the said cases the others or other of the partners, if they or he should think fit, should be at liberty to dissolve the partnership, by giving to the partner who should offend in any of the particulars aforesaid, or leaving in or upon the said messuage or office or other place wherein the said partnership practice should then be carried on, a notice in writing declaring the partnership to be dissolved and determined; and the partnership should, from the time of giving or leaving such notice, or from any other time to be therein specified for the purpose, absolutely cease and determine accordingly; without prejudice, nevertheless,

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to the remedies of the respective partners for the breach or non-performance of all or any of the covenants and conditions contained in the deed, at any time or times before the determination of the partnership; and the partnership should thereupon be dissolved in the same manner and with the same consequences, as if it had determined by the voluntary retirement of such offending partner.

The 2300*l.* being paid by the Plaintiff, and the stipulated capital having been provided, the partnership business commenced immediately upon the execution of the articles. In November, 1847, Messrs. *Flood & Lott*, the bankers of the partnership, stopped payment, and became bankrupt; and it then appeared that the Defendant *Philip Mules* was debtor to the bankers on his own account to the amount of 5000*l.*, and on account of a former partnership in which he had been engaged to a very much greater amount.

The partnership with the Plaintiff still went on until January, 1849, when *Philip Mules* absconded. Several attempts were then made to bring the matter to an arrangement, which, however, failed; and on the 14th of May, 1849, the Plaintiff served *Philip Mules* and *Horace Mules* with the following notice:—"I hereby give you and each of you notice, that, pursuant to and in exercise of the power now vested in me under and by virtue of the 16th clause of the deed or articles establishing the partnership subsisting between you, *Philip Mules* and *Horace Mules*, and me, *John Bridgeman Smith*, bearing date the 22nd of June, 1847, I declare the said partnership to be dissolved and determined, for and by reason of the breach by both and each of you of the covenants, stipulations, and agreements in the said deed of partnership contained; and I hereby give you further notice, that I am ready and will-



ing to proceed to a reference of all matters in dispute between us respecting my dissolution of the partnership, in pursuance of the 18th clause of the said deed of partnership."

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The Plaintiff filed his bill on the 12th of June, 1849, against *Philip Mules* and *Horace Mules*, stating the foregoing facts; and alleging that the Defendants had not introduced the Plaintiff to the clients of the partnership, or informed him of the business of the partnership; and that they had not furnished him with the means of keeping the accounts of the partnership; and that the Defendant *Philip Mules* had conducted at his private house business of the partnership which ought to have been conducted at the offices; that the Defendant *Horace Mules* had also conducted business of the partnership; and that the said Defendants respectively had not furnished the Plaintiff with information respecting the business so conducted by them respectively, or made entries or enabled the Plaintiff or any other person to make entries in the books of the partnership relating to the business so conducted by them respectively. And that the Defendants respectively had received monies due to the partnership, and had not accounted to the Plaintiff for the same, and had not entered the same in the books of the partnership, nor furnished the Plaintiff with the particulars thereof, so as to enable the Plaintiff to enter the same in the books. That the Defendants had not, nor had either of them, procured or endeavoured to procure the Plaintiff to be associated with them in the several offices, which, according to the articles of partnership, were to form part of the partnership business. And that *Horace Mules* had, contrary to the provisions in the articles, procured himself to be appointed to some of such offices in his own name alone, and the Defendants had procured others of such offices in the joint names of *Philip*

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*Mules* and *Horace Mules* only. That, owing to such neglect of the Defendants in making proper entries in the books, the Plaintiff was unable to make out the bills of costs for business done since the partnership began. And that, in consequence of the neglect and omission of the Defendants to introduce the Plaintiff to the several clients of the partnership, and to inform him fully respecting the business thereof, the partnership had been wholly, or to a very great extent, valueless to the Plaintiff, and the consideration for the payment of the 2300*l.* had wholly, or to a great extent, failed.

The bill charged that the Defendant *Horace Mules* was present when the terms on which the Plaintiff was to be admitted into the partnership were discussed, and when the Defendant *Philip Mules* represented the value of the business to be at least 1500*l.* a year. And, in particular, the Plaintiff charged, that, in June, 1847, a meeting took place between Mr. *Bridgeman* and *Philip Mules*, at which meeting instructions were agreed on between them for the preparation of the articles of partnership; and that on the same day, and after such meeting, Mr. *Bridgeman* saw *Horace Mules*, and that a conversation was had between them respecting the said partnership, and *Horace Mules* told Mr. *Bridgeman* that he had no doubt the value of the business, including the income of the offices reserved to himself, was 1500*l.* per annum. The bill charged that the Defendant *Horace Mules* had, on different occasions, admitted the other facts alleged by the bill; and prayed that it might be declared, that the partnership was dissolved as from the 14th of May, 1849; and that an account might be taken of its transactions, and of the profits thereof; that the Defendants might be decreed to resign the several offices held by them or either of them, which, according to the provisions of the articles of

partnership, ought to be considered as partnership offices and appointments; and that the Defendants might be restrained by injunction from practising as attornies or solicitors, or aiding in any such practice for twenty years, to be calculated from the 14th of May, 1849, within thirty miles of *Honiton*, and also from removing or keeping, otherwise than at the partnership offices, the partnership books and papers.

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The bill was taken pro confesso against *Philip Mules*.

The Defendant *Horace Mules*, by his answer, denied all knowledge of the particulars of the negotiations for the partnership, or of the representations made by his father to the Plaintiff or Mr. *Bridgeman*. He denied that he had, contrary to the provisions of the articles, procured himself to be appointed to some of the said offices in his own name alone, or otherwise; but he said that *Philip Mules*, who had been long known and respected in the neighbourhood, and in order to prevent the entire loss of the Clerkships of the *Honiton* and *Ilnminster*, *Honiton* and *Sidmouth*, and *Honiton* Turnpike Trusts, procured his (*Horace Mules*) name to be associated with the name of *Philip Mules* as the holders of such offices; and because it would not, as they believed, have been possible to procure the name of the Plaintiff to be so associated as such holder; and he said, that the said offices were held for the benefit of the partnership. The Defendant *Horace Mules* said, that he was interested only as a sub-partner, and that he was ignorant whether the Plaintiff had or had not received any of the profits of the business. He imputed to the Plaintiff incapacity for business, and set out a correspondence which had taken place, for the purpose of shewing that he had done all in his power to come to an amicable settlement. The Defendant denied the alleged breaches of the partnership articles, and said, that he had nothing to do with the

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arrangement or negotiations which had taken place between the Plaintiff and *Philip Mules*, or any other person, prior to the commencement of the partnership; and that he had, neither directly nor indirectly, received any part of the premium paid by the Plaintiff. The Defendant submitted, that, as the Plaintiff had dissolved the partnership as regarded the Defendant, without any default on his part, the Plaintiff was bound by all the consequences of such act, according to the terms of the articles.

The witnesses for the Plaintiff proved, that, in November, 1847, the Defendant *Philip Mules* solicited and procured the appointment of the Defendant *Horace Mules* to be joint clerk with himself to the *Honiton*, the *Honiton* and *Sidmouth*, and the *Honiton* and *Ilminster* Turnpike Trusts, and that he made no application to have the Plaintiff joined in any of those appointments; that about the same time he either procured the appointment of the Defendant *Horace Mules* to be joint clerk and registrar with himself to the *Honiton* Poor Law Board, or at all events did not attempt to procure the appointment for the partnership; and that, in April, 1849, the Defendant *Horace Mules* procured himself to be appointed clerk, and the Plaintiff assistant clerk, to the Commissioners of Taxes. That the Defendant *Horace Mules* was very irregular in entering in the books the business transacted by him on account of the partnership; and that he had both received and paid some monies on account of the partnership which he did not enter in the books; and that the Plaintiff was not introduced to the clients of the firm.

The witnesses on the part of the Defendant *Horace Mules* ascribed the appointment of the Defendant *Horace Mules* to the clerkships to objections having been made to the firm being appointed. They proved that the Plaintiff was introduced to several of the clients, but that he

took an inconsiderable part in the business, and avoided seeing persons who came on business; and they also stated that the Defendant *Horace Mules* was in the habit of sending to the Plaintiff the monies which he received on account of the partnership.

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The *Solicitor-General* and Mr. *Dickinson* for the Plaintiff.

Argument.

Mr. *Rolt* and Mr. *Eddis* for the Defendant *Horace Mules*.

*Philip Mules* did not appear.

*Bozon v. Farlow* (a), *Kimberley v. Jennings* (b), and *Talbot v. Ford* (c), were mentioned in the argument.

VICE-CHANCELLOR:—

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The bill in this case does not seek to set aside the purchase of the business by the Plaintiff, or to recover back the 2300*l*.; and therefore the evidence which has been gone into on both sides as to the solvency of Messrs. *Flood & Lott*, the bankers of the partnership, and as to the Plaintiff's competency for business, and the evidence on behalf of the Defendant *Horace Mules* as to the value of the business at the time of the negotiation for the purchase, does not appear to me to be material. The question to be determined is not, whether the articles of partnership are valid, but what, in the events which have occurred, are the rights of the parties under them.

In determining this question, I think it necessary to dis-

(a) 1 Mer. 459.

(b) 6 Sim. 340.

(c) 13 Sim. 173.

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tinguish between the several heads of relief which are prayed by the bill: the dissolution of the partnership as from the 14th of May, 1849, the injunction to restrain the Defendants from practising, and the relief which is asked as to the offices.

As against the Defendant *Philip Mules*, I am of opinion, that a sufficient case for the dissolution of the partnership, under the provisions of the 16th clause of the articles, upon a proper notice given for the purpose, is proved to have existed. The fact of this Defendant having absconded in January, 1849, and not having returned to the business, constituted a sufficient case for such a dissolution as against him; but I do not think it follows, that because a case for such a dissolution existed as to the Defendant *Philip Mules*, the Plaintiff was, therefore, entitled to dissolve the partnership as against the Defendant *Horace Mules*. In order to give him that right, I think the Plaintiff was bound to shew, that a case for dissolution, under the 16th clause, had arisen as to that Defendant also; and it is to be considered, therefore, whether he has proved such a case.

There are several events on which the right to dissolve is given by this clause, but two of them only are material to be considered, it not being suggested that the case falls within any of the others. The two events material to be considered are these:—First, “If, contrary to the stipulations hereinbefore contained, either of the partners shall not (not being prevented by illness or unavoidable accident,) diligently and faithfully employ himself in carrying on the partnership practice;” and secondly, “If either of the partners shall not, as often as he shall receive money, bills, notes, or other securities, immediately thereupon make or cause to be made due entries thereof in the proper books of accounts of the partnership, and shall knowingly or wilfully make such omission.”

With reference to the first of these events, I think it is pointed only to the diligent and faithful management by each partner of the business conducted by him; and I think so for these reasons:—The provision in terms applies to the partnership practice; and like the other provisions of this clause, evidently refers to the previous provisions of the articles, and was intended to enforce them; and on referring to the 2nd clause of the articles, to which this provision relates, it will be found that it applies to the diligent and faithful conduct by each of the partners of the professional business of the firm.

It was argued on the part of the Plaintiff, that the Defendant *Horace Mules* could not be said to conduct the business diligently and faithfully, when he did not communicate with the Plaintiff upon the subject of the business; but it is to be observed, that the 3rd clause expressly stipulates for each partner communicating with the other on matters of business, upon request; and I think therefore that a request at all events was necessary to bring this part of the clause into operation; and finding no allegation or proof of any such request, or of any want of diligence or faithfulness on the part of the Defendant *Horace Mules* in the conduct of the business undertaken by him, I am of opinion that the case as to him does not fall within this branch of the 16th clause.

I am of opinion also, that the case as to this Defendant does not fall within the other branch of the 16th clause, which has been relied on upon the part of the Plaintiff. In order to bring the case within that part of the clause, I think it must be shewn, not only that there was an omission to enter receipts, but that the omission was knowingly and wilfully made; and I think that the Plaintiff has failed to prove that there was any designed or wilful omission on the part of the Defendant *Horace Mules* in entering

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An agreement, that, if any of several partners should not diligently and faithfully employ himself in carrying on the partnership practice, the others might give notice of dissolution—construed to refer to the diligent and faithful discharge by each partner of the portion of business carried on by him.

A designed or wilful omission to make proper entries in the partnership books must be shewn, in order to establish a case of breach of the partnership articles on the ground of an omission to make such entries.

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his receipts. On the contrary, all the sums which have been pointed out as having been received by him and not entered in the regular books of the partnership, were, with one exception only, entered in his diary; and the bill does not allege, nor is it proved, that they were not entered at the time when they were received; and with respect to the excepted item, it is of small amount, and it would be going much too far to infer any culpability from the omission of it. Mr. *Bridgeman*, it is true, proves that this Defendant admitted that he had received monies which he had not entered; but his evidence does not shew what was the extent of the omission, or that the omission was either knowingly or wilfully made. The conclusion at which I have arrived on this part of the case, is, that the Plaintiff has proved such a case as entitled him, on giving a proper notice for the purpose, to dissolve the partnership under the 16th clause of the articles as against the Defendant *Philip Mules*, but not as against the Defendant *Horace Mules*.

Has then the partnership been well dissolved under the 16th clause of the articles? I am of opinion that it has not, and that the notice given by the Plaintiff did not work a dissolution under that clause. The clause provides, that, in the event of a breach by any partner, the others or other of the partners may give notice to dissolve; and whatever might have been the effect of the Plaintiff's notice if he had established a breach by both the Defendants, I think that, having failed to establish a breach by *Horace Mules*, it was not competent to the Plaintiff alone, without the concurrence of that Defendant, to give a notice of dissolution which should be effectual under the clause; and in this state of circumstances I think that the Plaintiff's case for the injunction to restrain the Defendants from practising falls to the ground, there being no title to the injunction unless the partnership be dissolved under the 16th clause of the articles.



It cannot however, I think, be said, that because the partnership was not effectually dissolved under the 16th clause of the agreement, by the notice which was given, it is therefore to be considered as subsisting. The conduct of the Defendant *Philip Mules* was such as entitled the Plaintiff to dissolve as to him; though he could not alone do so under the provisions of the 16th clause. The Defendant *Horace Mules* by his answer adopts the notice, and treats the partnership as dissolved; and the Plaintiff, having given the notice, cannot I think insist that the partnership continues. I am of opinion, therefore, that the partnership must be considered to have been dissolved as on the 16th of May, 1849, although not with the consequences attaching to a dissolution under the 15th clause.

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It then remains to be considered, what is to be done as to the offices. By the 5th clause of the articles, the defendant *Philip Mules* was forthwith to use his best endeavours to procure the appointments to be made and given to the partnership firm. They were, as between the partners, to be considered as partnership offices. The Defendant *Horace Mules* was to receive the salaries attached to them as his share of the profits of the business, so long as the Defendant *Philip Mules* continued in it; and on his retirement or death the emoluments of the offices were to be divisible in the same manner as the other profits of the business. If the appointments to the offices had been procured for the partnership firm, according to the covenant, the plaintiff would, upon the dissolution, either have had a share of the profits of the offices, or a chance of competing for them; but so far from the Defendant *Philip Mules* having observed the covenant entered into by him, he has acted in direct breach of it; and the Defendants are now holding these offices for their exclusive benefit under his breach of covenant, and in fraud of the contract into which

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he entered, and to which the other Defendant was a party. I am much disposed to think that the 5th clause of the articles, applying as it does to the offices, and not merely to the profits of the offices, is of itself sufficient to constitute them partnership assets, as well after the dissolution as during the continuance of the partnership; but whether this be so or not, I think, that, under the circumstances to which I have referred, the Defendants cannot be permitted to hold these offices for their exclusive benefit. The right of the Defendant *Horace Mules* to receive the emoluments of them ceased with the partnership. The Plaintiff, not having succeeded in effecting a dissolution under the 16th clause, is not exclusively entitled to them; and I think, therefore, the proper relief as to these offices is, to charge the Defendants with the value of them in the partnership accounts. From the nature of them they cannot be sold, nor can any manager or receiver be appointed to carry them on. I shall, therefore, in the decree, give directions for that purpose, as to the three offices mentioned in the 5th clause; but I cannot give such directions as to the other offices, for I do not think they are reached by the 6th clause; and there being no retirement, or death, or dissolution for misconduct, I do not think the 15th and 16th clauses can be held to apply to them.

The Defendant *Horace Mules* has set up the case of his being a sub-partner merely, relying upon the 13th clause of the articles; but this point was not insisted upon at the bar, and I do not think it can be maintained. The clause in question, as I construe it, applies only to any share which might be assigned to this Defendant by the Defendant *Philip Mules*.

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DECLARE the partnership dissolved as on the 16th of May, 1849. Direct the usual accounts of the partnership. Refer it to the Master to set a value on the three offices mentioned in the 5th clause of the articles, after making a reasonable allowance for conducting the business of the same—the Defendants to be charged in the partnership accounts with the value which the Master shall so fix. Direct an account of the profits of the said three offices received by the Defendants since the dissolution, the Master in taking the account to make such reasonable allowance as aforesaid. Dismiss the rest of the bill, without costs. Reserve further directions and costs, so far as the bill is not dismissed, and subsequent costs.

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The Lords Justices, on appeal, varied the order, by including, in the direction for valuation, the other offices (a) as well as the three offices mentioned in the 5th clause.

(a) The other offices were Clerk to the Trustees of the <i>Honiton</i> and <i>Minster</i> Turnpike, and Clerk to the Commissioners of the Land	Tax, Assessed Tax, and Property Tax, for the Division of <i>Arminster</i> .
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April 19th  
& 20th.

## MACBRIDE v. LINDSAY.

Bill by one of the shareholders of the Eastern Archipelago Company, which was incorporated by charter, alleging that the public purposes of the grantors of the lands and mines which the Company held, and in furtherance of which the Plaintiff had subscribed for shares, had not been fulfilled; and that such grants had been diverted in a great degree to private objects; and that the charter had been granted by the Crown on condition that a moiety of the capital should be subscribed for, and a fourth thereof paid up within a limited time, which condition also had not been fulfilled; and that, having failed to fulfil such intentions and conditions, it was a fraud on the part of the directors to certify that they had been performed, and to commence the business of the Company and make calls, as they had done; and praying repayment of such calls, an injunction to restrain the directors from making calls and carrying on business for the future, and an indemnity to the Plaintiff. The Company and directors demurred to the bill, and the demurrer was allowed.

A party becoming a member of a public company or corporation upon false representations, made not to him alone, but to him and other members, cannot be entitled, on that ground, to any decree for the repayment of his subscriptions, to which the other members would not be equally entitled; and if he be entitled to such repayment, he cannot obtain that relief in the absence of the other members.

It is no ground for relief in equity at the suit of a shareholder against the Company, that the charter from the Crown or the grant to the Company from a private person has been obtained by misrepresentation to the Crown or to such grantor. It is for the Crown or the grantor, if either should complain of the fraud and misrepresentation, to take proceedings to set aside the charter or the grant.

The provision, that the business of the Company should commence from the date of the certificate of the directors that a stipulated number of shares had been subscribed for and the stipulated capital paid up,—*held* not to mean that the Company was not to exist antecedently to that date,—where the deed also provided that the parties were to be associated, the business to be carried on, and the directors to have power to act for the Company, notwithstanding the full number of shares were not subscribed for.

The averment in the bill, that the Defendants alleged that the other shareholders had concurred (or the admission of the Defendants, the directors, that the other shareholders had concurred,) in the prosecution of the business of the Company, notwithstanding the terms of the charter were not satisfied, does not afford ground for a decree which might prejudice the interests of the other shareholders; for the allegations (or admissions) of the Defendants cannot be taken as proof of the conduct, or affect the rights, of such other shareholders.

Where it appeared upon the bill that the deed of settlement of the Company was enrolled in Court, and that the Plaintiff had seen the deed, (the bill stating the number of shares which were subscribed for thereupon), the allegation in the same bill, that the plaintiff was ignorant and unable to discover who the shareholders were, was not, upon demurrer, taken to be a fact; and, in such a case, the Court, weighing one allegation against the other, *held*, that the absence of the other shareholders was not sufficiently accounted for.

in the Company, with interest; and that the directors and the Company might be restrained from making any further call upon the Plaintiff, or taking any proceedings against him to recover any such call; and that the directors might also be restrained from entering into any contract or carrying on any business in the name of the Company, under or in respect of which the Plaintiff might be in anywise liable; and that the directors (and the estate of the deceased director) might indemnify the Plaintiff against any liability in respect of carrying on the business of the Company.

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The bill stated the cession of the island of *Labuan* to the *British* crown, and an agreement of the 23rd of August, 1846, whereby the Sultan of *Borneo* conceded the coal in a large district of the mainland of that island to Sir *James Brooke*; and that such grant was taken by Sir *James Brooke*, not for his own benefit, but that he might dispose of it in such a manner as should be most conducive to the developement of *British* commerce in *Borneo*, and the advance of civilization among the native tribes. That the Defendant *Henry Wise*, who had been the agent of and was in the confidence of Sir *James Brooke* in or previously to the year 1847, formed an idea of establishing a Company for working the coal so granted to Sir *James Brooke* by the Sultan, and the coal to be found in *Labuan*; and the Defendant *Henry Wise* communicated his project to Sir *James Brooke*, who promised to make over the grant to him if the Government approved of his doing so. That the Defendant *Henry Wise* applied to the Board of Trade, and obtained a charter under the Great Seal, dated the 17th of July, 1847, by which, after reciting that it had been represented to her Majesty that *John Melville*, *Philip Anstruther*, and *Henry Wise*, and others, had agreed to subscribe 200,000*l.* in 2000 shares of 100*l.* each, and form a Company, to be called The *Eastern Archipelago Company*,

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for the purpose of purchasing and acquiring, holding, settling, improving, cultivating and planting, letting, farming, selling, or otherwise dealing with and making a profit of lands in *Labuan* and the lands adjacent, and working the mines therein, and raising coals, stones, earths, minerals, and metals, and trading therewith and with the inhabitants of the said islands and lands,—her Majesty granted and ordained that *Melville*, *Anstruther*, and *Wise*, and all such other persons as should or might become members of the Company, and hold shares therein of not less than 100*l.* each, should be a body corporate under the said name; and that the Court of Directors, to be constituted by the deed thereafter directed to be executed, should have full power and authority to enter into all contracts on behalf of the corporation, and to make and execute all purchases, sales, and other acts to which the corporate seal should require to be affixed, and generally to bind the corporation, as if the same were done by the assent of the whole body, so as the same were done in conformity with the provisions of the charter and deed or any supplemental deed. And the Company were thereby empowered to hold lands as therein mentioned. And it was thereby directed, that at the least 100,000*l.* of the capital should be subscribed for, and 50,000*l.* paid up within twelve months from the date of the charter; and that a deed of settlement, as thereby prescribed, should be executed by the members of the corporation, and a copy of such deed, within the said period of one year, be lodged with the Board of Trade; and that a certificate to that effect, to be indorsed on the charter and on the deed, under the hand of one of the secretaries of the Board, should be conclusive evidence that the deed of settlement had been duly prepared, and a copy thereof deposited as thereby directed; but such certificate should not be given until it should be made to appear that all the directors for the time being, and at least two-thirds of the members, had executed the

same. And her Majesty did thereby direct that the Company should not commence business until it should have been certified to the President of the Board of Trade by at least three of the directors, that at least one-half of the said capital had been subscribed, and the sum of 50,000*l.* at the least paid up; such certificate of the directors to be indorsed on the charter, and to be sufficient evidence 'for the purpose of the said provision in that behalf.' And her Majesty thereby declared, that, in case the corporation should fail to enter into and execute such deed, and to deposit a copy thereof within the said period, or in case the corporation should not comply with any other the directions and conditions in the charter contained, it should be lawful for her Majesty, her heirs and successors, to revoke the charter, and every clause and matter therein, either absolutely, or under such terms and conditions as she or they should think fit.

The bill alleged that *Melville* and *Anstruther* had never any interest in the concern, and that their names were used by the Defendant *Wise* for his own purposes and to mislead the Board of Trade, and subject to an understanding that they were not to advance any capital. That Sir *James Brooke* conceded to the Defendant *Wise* the benefit of the grant from the Sultan of *Borneo* of the coal in the mainland, under the belief (as it had been represented to Sir *James Brooke* by the Defendant *Wise*) that the same would be used for the formation of a Company, with sufficient capital effectually to carry out his views, and develope British commerce in those islands. That the Defendant *Wise* obtained from the Crown a demise of certain coal in *Labuan* for a term of years; that, having obtained the charter, grant, and demise, the Defendant *Wise* determined to assume that he had acquired such interests for his own benefit, and not for the purposes of a projected Company. That, in prosecution of his scheme, he

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prevailed upon *A. Nairne*, Sir *J. Pirie*, the Defendant *Lindsay*, *J. M'Gregor*, and *J. R. D. Bethune*, to sign an agreement of the 31st of January, 1848, which, after reciting that for several years the Defendant *Wise* had devoted himself to the investigation, discovery, collection, and arrangement of materials for effecting the objects of the Company, and during that time had made personal researches in *Borneo* and *Labuan*, and had conducted important communications with the Government and influential bodies and individuals,—had successfully promoted the establishment of a British settlement at *Labuan*, and had obtained the charter of incorporation of the Company,—the Defendant *Wise* thereby agreed to grant to the Company, on its complete formation, for twenty years, his interest under the said grant and demise or agreement for a demise; and in consideration of such grant by him, and of the efforts, labour, and services which he had so bestowed and rendered, it was agreed that the Defendant *Wise* should be one of the managing directors of the Company, irremovable, except, by a general meeting of the shareholders, for misconduct or incapacity; and that he should be paid 6000*l.* in four months after the formation of the Company, and 3000*l.* a year during the first ten years of its existence, and receive 100 shares, the calls on which were to be paid out of the capital of the Company, and 2*l.* 2*s.* per cent. on the dividends and bonuses of the Company, when the same should not be less than 7*l.* 10*s.* per cent. on the capital, and 800*l.* per annum as managing director, and 2*l.* 10*s.* per cent. on the general dividends and bonuses, such salary and latter per-centage not to exceed 1800*l.* in the whole;—the Defendant *Wise* thereby binding himself to give his best services to the affairs of the Company during its existence; and, at the end of twenty years or the dissolution of the Company, his rights were to revert to him.



The bill stated portions of the prospectus of the Company which was issued; and that the Plaintiff and several other persons, within the twelvemonth, subscribed for and took shares in the projected Company, and paid the deposit on such shares, and executed the deed of settlement. The bill set forth part of the contents of the deed of settlement, which it stated bore date the 13th of July, 1848, and was enrolled in the Court of Chancery (a). The bill then stated, that, shortly after the date of the deed, *Wise* and two others of the directors certified to the Board of Trade, that half of the capital had been subscribed, and that 50,000*l.* had been paid up; and that a certificate was indorsed on the deed by the secretary of the Board, dated the 27th of July, 1848, to the effect, that the deed had been prepared to the satisfaction of the President; that a copy of it had been lodged at the Board of Trade; and that it had been certified to the President, that all the directors and two-thirds of the members of the corporation had executed the same.

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The bill stated that the Plaintiff had, within the last two months, investigated the affairs of the Company, and had discovered that the certificate, that 50,000*l.* had been paid up, was untrue; and that, of 1116 shares, which were the whole now subscribed for on the deed, 100 shares had been allotted to *Wise*, who was not liable to pay any call, and therefore that 101,600*l.* only was subscribed for on the deed; and that many of such shares were subscribed for after the twelve months had expired; and that less than 100,000*l.* was in fact subscribed for within the twelve months; and that a copy of the deed was not deposited within that time. That it was from the beginning altogether impossible that the Company could be carried on, with such amount of capital, so as to produce profit or fulfil the intentions of the Government and Sir *James Brooke*.

(a) The material portions of the deed are mentioned in the judgment.

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The Plaintiff stated, that he was principally induced to take the shares, by the references made in the prospectus to Sir *James Brooke*. The bill charged that the directors ought not to have commenced or continued the business of the Company, but ought, at the expiration of the twelve months, to have returned to the Plaintiff and the other persons who had then executed the deed, the amount of their deposits; and that the signing the said certificate, the concealment of the true facts from the Plaintiff and the other shareholders, and the carrying on the business of the Company under such circumstances, were acts of fraud on the part of the directors.

The bill stated that the Defendants alleged, that all the persons who had executed the deed or become shareholders, other than the Plaintiff, had precluded themselves from making any demand against them in respect of the said matters; that the Plaintiff was ignorant of the names of the other shareholders, or any of them; and that the Defendants ought, but refused, to disclose and set forth the names and places of abode of such other shareholders.

*Argument.*  
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Mr. *Russell* and Mr. *Freeling* for the demurrer of the Defendants *Lindsay*, *Barnard*, and *Wise*; and

Sir *W. P. Wood* for the demurrer of the Company, argued, that the Plaintiff had become a member of the corporate body, and had acquired no right to withdraw from the corporation. Assuming that the other members of the corporation had acted improperly, that did not discharge the Plaintiff from being a member. He had a remedy for the correction of the misconduct complained of, but not by a suit like the present. His case was only the same as that of every other member of the corporation who had sustained the same injury, and he could not sue alone. It

might be open to the Crown to revoke the charter, but, until revoked, it remained in full force. The bill, even if sustainable, had it been properly framed, was defective for want of the other corporators as parties.

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Mr. *Rolt* and Mr. *Prior* for the bill.

The Plaintiff agreed to become a member of the corporation only on the condition that it should be commenced and carried on according to the provisions of the charter. The Defendants have formed and carried on the business of the Company, not according, but contrary to, and in defiance of, those provisions. The Crown has been misled by untrue and fraudulent representations, and the Plaintiff is not, by being fraudulently inveigled and compulsorily retained as a member, to be made a party to this fraud. As against the Plaintiff, or so far as respects him, the Company must be considered as yet unformed; and he is entitled to be protected from the legal consequences to which the acts of the Defendants have exposed him, and to be reimbursed the monies which have been improperly obtained from him. Even if the Defendants have succeeded in making the Plaintiff a member of their corporation,—still it is clear that they have no right to go on with the business, or make the calls, in the deficient state of the subscriptions to the share list.

As to the objection of parties—the Company being Defendants, every member of the Company is a party, or represented. What the case of the other members of the corporation may be, is a question the Plaintiff is not concerned with: they may be disposed to go on with the objects for which the corporation purports to be formed; but the case of the Plaintiff is, that he has not contracted to be a member of such a body, and he declines to be a member of it. Even if the other members were individually

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necessary parties, the bill, which avers that their names are unknown to the Plaintiff, is not open to demurrer on that ground.

The following cases were cited: *Colt v. Woollaston* (a), *Mangles v. The Grand Collier Dock Company* (b), *Foss v. Harbottle* (c), *Waring v. The Manchester, Sheffield, and Lincolnshire Railway Company* (d), *Lord v. The Governor and Company of the Copper Miners* (e), *Ex parte Earl of Mansfield* (f).

*Judgment.* VICE-CHANCELLOR:—

The rights of the Plaintiff, as represented in this bill, in some respects relate to his private and individual case, and in others, to his case in common with the other members of the Company. His private and individual case is, that a fraud has been committed upon him, not in common with the other members of the Company; and part of his general case is, that a fraud has been committed on him, and upon all the members of the Company.

Now, the first part of the case stated by the bill, and which was argued on the part of Dr. *Macbride*, was this: that false representations had been made to Sir *James Brooke*, and also had been made to the Crown; and that on those false representations Mr. *Wise* had acquired an interest to himself: the nature of the case stated being, that Sir *James Brooke*, intending to promote the progress of civilization through the medium of commerce in the *Eastern Archipelago*, obtained a grant from the Sultan of *Borneo* of part of the coal in that island, and intended

(a) 2 P. Wms. 154.

(b) 10 Sim. 519.

(c) 2 Hare, 461.

(d) 7 Hare, 482; 2 H. &amp; T. 239,

*S. C.*, on appeal.

(e) 2 De G. &amp; S. 308.

(f) 2 Mac. &amp; G. 57.

that that grant should be applied for the benevolent purposes which he had in view; that, on the other hand, Mr. *Wise* has turned that grant to his own purposes, having obtained the benefit of it from Sir *James Brooke*, under the representation that it would be applied to the benevolent purposes which he had contemplated. And so again, with reference to the grant from the Crown, that Mr. *Wise* obtained it under the representation that it was to be for public purposes, but has in truth diverted it to his own private objects.

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Now it is perfectly clear the Court has nothing whatever to do with those questions, so far as they affect either Sir *James Brooke* or the Crown. If the Crown thinks that there has been an injury worked to its rights by its having been induced to make an improper grant, it is for the Crown to proceed to set aside that charter, which has been fraudulently obtained. So, again, if Sir *James Brooke* considers that he has been deceived by Mr. *Wise*, it is for Sir *James Brooke* to proceed to set aside that grant. But the mode in which this is brought to bear upon the present case is this, that it is said the directors of the Company knew this fact, and fraudulently concealed it from the Plaintiff; and that the Plaintiff therefore has been, by their false representations, drawn into becoming a partner in the concern. That, as I understand it, is the argument on the part of the Plaintiff on that part of the case.

Now I do not find, in the allegations in this bill, any such case made as would, I think, warrant me in interfering on that ground. If it should appear that the Plaintiff has entered into this agreement, not on any false representation made to him individually, but by false representations made to him and other members of the Company—if that be a case which can at all be taken into account on this bill, it is a case which does not merely

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affect the Plaintiff individually, but affects the Plaintiff in common with the other members of the Company. It is not alleged, that there has been any representation made to the Plaintiff which has not been made to the other members of the Company; and when therefore he asks that the money which he has paid on this account may be returned to him, he is in truth asking that that which is common to himself and the other members of the Company may be done in his favour, and in his favour only. It is clear that cannot be done without affecting very seriously the rights of the other partners. If I were on the hearing, and considering the state of facts as it appears on the bill, and were to decree repayment to the Plaintiff of the money which he paid on account of the Company, equally must I decree repayment, to any other party who has subscribed to this Company, of the fund which has been subscribed by him. The case, therefore, is one in which the Plaintiff, having a common interest in that point of view with the other parties, thinks proper to seek relief in the absence of those other parties who will be affected by the relief which he has prayed, and which he has prayed for himself exclusively.

Now, I am of opinion that he cannot obtain such relief in the absence of the other parties who are interested in this concern; and, as I thought for a long time during the progress of the argument, I believe this case really resolves itself at last into a point of pleading,—whether there is or is not a sufficient allegation on the bill of the absence of the other parties who are interested.

The view which has struck me on this part of the case (and I believe the same argument and the same reasoning apply throughout the case, as well as to the peculiar point to which I am now addressing myself,) is this: either the Plaintiff has or has not a common interest with all the

other partners in the concern. If he has a common interest with all the other partners in the concern, he must sue on behalf of himself and all those other partners; and if he has not a common interest in the concern, those other partners must be represented upon this record, in order to contest and examine that question.

Now the statement upon the point of the absence of the other parties, is simply this,—that the Plaintiff is unable to discover the shareholders of the Company, that he is ignorant who are the other partners in the concern, and that the Defendants refuse to discover the same. But in the same bill which contains that allegation, there appears this fact,—that the deed is enrolled in the Court of Chancery, and that the Plaintiff has inspected the deed; because he tells us, on the face of the bill, the number of shares which have been subscribed for upon that deed. And weighing, as I must do, that allegation against the allegation that he is unable to discover the names of the other shareholders, or any of them, I cannot give credit to the allegation that he does not know who are the parties interested. The Plaintiff tells me that he has seen the deed, and that 1116 shares have been subscribed for upon that deed. I think, therefore, it follows that there is not here any sufficient allegation to account for the Plaintiff's not having made parties to this record the other persons who are interested in the question. Upon that ground, I think this demurrer must be allowed.

I do not, however, think it would be satisfactory altogether to part with the case upon that narrow ground alone, without considering a little more the questions which have been raised and argued.

It is said, in the first place, that the Plaintiff never became a member of this partnership. In my opinion, the

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If a member of a Company has a common interest in the subject of his suit with the other members, he must sue on behalf of himself and all the other partners; and if he has not such common interest, the other partners must be represented on the record, that they may be heard upon the question.

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Judgment.

Plaintiff has become a member. According to the terms of the charter, her Majesty granted and ordained that *Melville, Anstruther, and Wise*, and all such other persons and bodies politic or corporate as had become, or from time to time thereafter might become, members of the said copartnership or Company so agreed to be formed, and should hold shares therein of not less than 100*l.* each, should be one body politic and corporate, by the name of *The Eastern Archipelago Company*. Thus, therefore, every person who becomes a member of the Company, and holds shares of not less than the specified amount, is to be a member of the corporate body. Now, how was this body constituted, and when was it to cease? The provisions are,—that 100,000*l.*, being one half of the capital, should be subscribed for within twelve calendar months, and that 50,000*l.* at least should be paid up within that period; and that *Melville, Anstruther, and Wise*, and all other members for the time being of the copartnership, should, within one year from the date of the charter, enter into and execute a proper deed of copartnership and settlement, whereby the capital of the Company should be divided into the said number of shares; and it was provided that the partnership should not begin to carry on business until it should be certified to the President of the Board of Trade, by three directors of the Company, that at least one half of the capital had been subscribed, and the 50,000*l.* paid up,—such certificate of the directors to be indorsed upon the charter; and it was provided, and her Majesty did thereby will and declare, that, in case the corporation should fail to enter into and execute such deed, and to deposit a copy thereof within the time limited in that behalf, or in case the said corporation should not comply with any other of the directions and conditions contained in the charter,—not that the charter should be void,—but that it should be “lawful for her Majesty, her heirs and successors, by any writing un-



der the Great Seal, or under the sign manual of her Majesty, her heirs or successors, to revoke or make void the said royal charter, and every clause, matter, and thing therein contained, either absolutely, or under such terms and conditions as she or they should think fit." That is a clause which gives power to the Crown to determine the charter, but it does not of itself determine it. That that was the meaning of the clause is perfectly clear; for the next provision is, that, notwithstanding anything therein contained, it should be lawful for her Majesty, her heirs, and successors, either under the Great Seal or by writing under the sign manual, at any period after the expiration of twenty-one years from the date of the charter, to revoke and make void the same, and to add such modifications, conditions, or provisions thereto, as her Majesty, her heirs or successors, should think fit; and it was thereby declared, that, when the said corporation should have been dissolved, in pursuance of the provisions of the said deed or of any supplementary deed, and the affairs of the said partnership should have been completely wound up, and its debts and obligations fully discharged, the said charter should be absolutely void. It is, therefore, when the corporation shall have been dissolved in pursuance of the provisions of the deed, and when the affairs shall have been wound up, and not until then, that the charter is made absolutely void, according to the provisions which are contained in it. I think, therefore, that the charter was not determined of itself by anything which was done.

The case then stands thus,—at a certain time after the granting of the charter, the Plaintiff takes shares in the Company, but the deed is not executed until the 13th of July, 1848. Now, whether by taking shares he became a member of the Company within the meaning of this deed, is a question I do not mean to say one word upon;

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but the question is, whether, when he executed that deed, he did not become a member of the Company, and hold shares therein within the meaning of the charter; and I think, upon the true construction of that deed, that he did become so.

The deed is made between the several subscribers of the first part, *Wise* of the second part, and the Company under their corporate seal of the third part. It recites the charter, it recites that the persons who were parties of the first part had subscribed for shares in the Company; and it witnesses, that, for the purpose of forming the Company, every of the persons parties thereto of the first and second parts, in consideration of the assignment thereafter mentioned on the part of *Wise*, adopted, ratified, and confirmed the agreement which had been entered into by them, in all respects as if the terms and provisions thereof were therein repeated and set forth; and then every of them the parties thereto of the first and second parts covenanted with the Company, that all and every the covenanting parties should confirm the several engagements in the deed on their part, as shareholders of the Company; that the name and business or purposes of the Company should be such as were described in the charter; it then provides for the amount of the capital of the Company, and that the Company should be held to commence from the day of the date of the certificate of the directors to be given as by the charter was provided, and should thenceforth continue, until dissolved under any of the provisions in the charter or the deed contained. And in case and while the whole of the 2000 shares should not be subscribed for, the shareholders should continue associated for the purposes aforesaid, according to their respective interests in the concern; and the directors and other officers of the Company acting under the authority of the deed should

have full power to do all acts and things authorised thereby, in the same manner as if the number of shares actually subscribed, for the time being, had been the whole number of shares by the deed agreed to be issued.

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Now, that this was intended to be a continuing business, and a business to be carried into effect and exist under the provisions of the deed immediately after the execution of the deed, no doubt can be entertained; for, in case the whole number of 2000 shares should not be subscribed for, the shareholders were to continue associated for the purpose specified. Then, if this were meant to be a continuing business existing from the time of the date of the deed, how can it be said that this gentleman was not a member of the Company or partnership which was referred to in the charter? The charter existed at the time of the execution of this deed, and provided that every person who should become a member of the partnership should be a member of the corporation. And if the true meaning of this contract be, as I think it is, that there was a partnership formed by this deed, by the act of the formation of the partnership and execution of the deed, Dr. *Macbride* became a member of the partnership, and, becoming a member of the partnership, became a member of the corporation created by the charter.

It was very much argued, that it could not be that the partnership was intended to exist, or the Company intended to be formed, because the operative part of the deed is for the purpose of the formation of the Company; and the clause is, that the Company shall be held to commence as from the day of the date of the certificate of the directors. I do not think that meant that the Company should not exist antecedently to that period. I think that was not the meaning, for we find the subsequent provisions, that the business should be carried on notwithstanding

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there had not been the number of 2000 subscribers; that it is to be carried on under the authority of the deed; that the directors shall have full power to do all acts and things authorised by the deed, one of which things is, that the name and business or purpose of the Company shall be such as was described in the charter.

*Effect of the  
 execution of the  
 deed of settle-  
 ment by the  
 Plaintiff.*

In my opinion, therefore, by the execution of this deed, the Plaintiff became a member of this Company within the meaning of the deed, and within the meaning of the charter; and, therefore, the argument which is urged on his behalf as to his not having become a member of the Company, cannot be maintained.

If, then, the Plaintiff has in truth become a member of the Company, what is his equity, to entitle him to recover back the amount of the subscription which he has paid? He says, that false representations have been made by the directors. The first answer to that argument is,—in what position has he placed the directors? He himself has been a party to the deed, by which the directors are to have all the powers which were to exist, as if the Company had been completely formed. He therefore has himself concurred in placing those directors in that position.

But how can one partner call upon this Court for a decree to repay him his share of the capital of the partnership, upon the ground of any fraud which has been committed by the managing directors of the Company? I assume, of course, upon this argument, as I am bound to do, that the allegations in this bill are true,—that there has been most gross fraud perpetrated on the present Plaintiff. But how is one partner to call upon a Company to refund his share of the capital? Why, the refunding of his share of the capital, if it be in respect of fraud which was committed on him individually, may

constitute an individual right in him. But if it be in respect of fraud which has been committed on the whole body of the Company, it is a right which is common to all, and which does not rest in him alone. And when he asks that his capital may be restored, he asks that the interests of all the other partners in the Company may, to the extent of the withdrawal of his capital, be prejudiced and damaged. It is clear, therefore, that he cannot, if he have once been in the position of a member of this Company, have the right to recal his capital, without having the parties who are copartners with him in that concern, and on whom the same fraud has been perpetrated as has been perpetrated on him, also upon the record.

It has, however, been argued for the Plaintiff, that all these parties have sanctioned and concurred in the fraud. The allegation in the bill does not amount to that. The allegation is this,—not that the other parties have sanctioned and concurred in it, but that the Defendants allege that the other parties have done so, and have precluded themselves from any redress in respect of that injury. But is this Court to be called upon to prejudice the interests of the other partners in the concern, because the directors of the Company allege that the other parties have precluded themselves. If I give full effect to the allegation in the bill, it amounts to no more than that. Observe what the position of the case would be at the hearing. Suppose that I had upon the answer an admission that the Defendants allege that the other partners in the concern have precluded themselves from complaining of what has been done, could I, upon that allegation, dispense with those other persons being made parties to this record? If so, it would be placing in the power of the managing body the means of defeating the interests of all the other parties, because they think proper to make an allegation, which they would be very likely to make, on account of the lia-

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*Judgment.*

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*Judgment.*

bility which would attach on themselves individually. I could not, therefore, dispense with the presence of those parties on the ground of such an allegation or admission.

I have already observed, that the allegation as to the absence of the other partners is not sufficient; and, as I think that the Plaintiff has constituted himself a member of the Company, and that, as a member of the Company, he cannot have any part of the relief which is prayed by the bill in the absence of the other members, I am of opinion that the demurrer must be allowed.

1851.

Dec. 16th,  
17th, 22nd.

Where a conveyance of an estate, obtained upon a pretended purchase from an aged and illiterate man, by a person who stood towards him in a confidential position, was set aside, the Court, being of opinion that there was in fact no purchase, refused to give the Defendant a decree for an account of monies paid by or owing to

### WILKINSON v. FOWKES.

THIS case is reported on a question of pleading and parties, in p. 193 of this Volume.

A supplemental bill was filed against *Susannah Field*, the administratrix of *Matthew Wilkinson*, and against the original Defendant, *Fowkes*. *Fowkes*, by his answer to the supplemental bill, averred the truth of the facts contained in his former answer. *Field* admitted that she was the administratrix. The Plaintiff set the cause down for hearing, without replication to the answer to the supplemental bill. At the hearing,

The *Solicitor-General* and Mr. *W. M. James*, for the

him, which he alleged (but failed to prove) was the consideration agreed upon for such purchase and conveyance. The rule, that a party coming for equity must do equity does not extend so far as to affect matters unconnected with the transaction in respect of which the relief is sought.

Case in which a party in a cause, heard upon bill and answer without replication, producing letters of administration to a deceased person,—the Court may admit them, to ascertain the representative character of such party, and may act upon the evidence which they furnish of that character.

Case in which, after parties have gone into evidence in an original suit, evidence is material or admissible in a supplemental suit.

Defendant *Fowkes*, insisted that his answer to the supplemental bill must be taken to be true, and that the Plaintiff was not entitled to a decree; and that, in the absence of a replication, no proof could, as against *Fowkes*, be given that the Defendant *Field* was the administratrix of *Matthew Wilkinson*.

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Statement.

Mr. *Bethell*, Mr. *Rolt*, and Mr. *Kinglake* for the Plaintiff.

Argument.

On the question of admitting documentary evidence where there was no replication, the conflicting cases of *Jones v. Griffith* (a) and *Rowland v. Sturgis* (b), *Chalk v. Raine* (c) and *Fielder v. Cage* (d), were cited.

VICE-CHANCELLOR:—

It is objected, first, that there is no proof, as against the Defendant *Fowkes* in the supplemental suit, that *Susannah Field* sustains the character of administratrix, and that there can be no decree without such proof; and secondly, that, the answer of *Fowkes* in the supplemental suit averring his answer in the original suit to be true, the case can only be adjudicated upon, on the facts stated in his answer in the original suit.

Judgment.

Conflicting cases were cited as to the right to prove documents where the answer is not replied to, and I give no opinion on that point. The Defendant *Field* producing letters of administration, I apprehend that the Court is entitled to look at them for the purpose of ascertaining

(a) 14 Sim. 262.

(b) 2 Hare, 520.

(c) 7 Hare, 393.

(d) Wy. Pr. Reg. 219. See, also, *Neville v. Fitzgerald*, 2 Dr. & War. 530.

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*Judgment.*

her representative character; and that fact being ascertained, and she submitting to be bound, I think the Defendant *Fowkes* can raise no objection on that ground.

As to the second point, my opinion is against the Defendant. I think the proper test of this question is, to consider what would have been the position of the case if the answer had been replied to? Could the Defendant *Fowkes* in that case have gone into evidence in the supplemental suit of the matters alleged in his answer in the original suit, and have used that evidence in the original suit? I think that he could not. If he could, the Plaintiff must also be entitled to introduce further evidence in support of his original case, and thus every supplemental bill would become the medium of opening new evidence on both sides. If this be the rule, it must apply to all supplemental suits, including cases where the supplemental suit is merely to introduce a new fact; and it would be strange, that, upon a bill to introduce a new fact, issue could be raised upon all the facts which had been already proved. The case of *James v. James* (a), which was cited on this point, was, I think, a case of new facts, introducing a new defence, and therefore not resembling the present.

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The VICE-CHANCELLOR was of opinion, upon the evidence, that the conveyance, which the Defendant *Fowkes* had obtained from the deceased, ought to be set aside; and after stating the facts and the result, proceeded—

The only other point is, whether the Defendant *Fowkes* has any right to insist upon an account before he is called upon to reconvey; and I am of opinion that he has not. In ordinary cases, where the Court sets aside a purchase,

(a) 4 Beav. 578.



the Defendant has such a right, because the Plaintiff coming into equity must do equity, and, therefore, must refund the money which he has received on account of the purchase; but in the present case my opinion is, that there never was a purchase, and, therefore, the Plaintiff can have received nothing on account. If anything like a purchase exists, it is colorable merely; and supposing, that, in a colorable transaction, the Defendant could be entitled to have an account taken of the debt due at the time of the transaction, (and it would be impossible to carry his case further,) the answer shews that he has received rents far beyond the amount of that debt. If the Defendant had proved that the agreement was, that he should purchase the estate, and pay for it by supplying goods, I should have thought him entitled to the account, but he has failed in that proof; and the rule, that a Plaintiff who comes into equity must do equity, does not, I think, reach so far as to affect matters not connected with the transaction in respect of which the relief in equity is sought. Both Lord *Hardwicke* and Lord *Cottenham* refused to give the rule so extended an operation (a).

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 Judgment.

(a) See, also, 4 Hare, 5, per Sir *J. Wigram*,

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By a marriage settlement freehold estate and some personal estate were conveyed and assigned to trustees upon trust, on the request of the husband and wife, during their joint lives, and, after the death of either, upon the request of the survivor, to sell the estate, and to stand seised and possessed of the estate until sold, and of the purchase-money, in case the same should be sold, upon trust for the husband for his life; and, after his decease, upon trust for the wife for her life; and after the death of the survivor of them to convey the estate, unless sold, and assign the personal estate, unto the children and grandchildren of the marriage, born in the lifetime of the husband and wife, as they or the survivor should appoint; and, in default of appointment, unto and amongst the children of the marriage, equally. The estate was taken by the corporation of London under the London Bridge Act (4 Geo. 4, c. 50), and the price having been fixed by a jury, the purchase-money was paid into Court under the Act,—the trustees of the settlement not making out a satisfactory title:—

*Held*, that, in the absence of any conveyance by the trustees, the sale must be deemed to have been effected under the Act of Parliament only; and, therefore, that the purchase-money was impressed with the character of real estate under the 35th section of the London Bridge Act.

That, if there had been any conversion, it must have been by the conjoint operation of the articles and settlement and of the Act of Parliament, but that the settlement and Act of Parliament could not in this case have any conjoint operation.

That the estate having been real when settled, it was not meant by the settlement that it should become personal, unless the husband and wife, or the survivor, requested it to be sold.

That the words of request should not be construed as merely intended to enforce on the trustees the obligation of sale, but as inserted for the purpose either of enforcing obligation or giving discretion, as the context of the instrument might require.

That the payment of money into Court, owing to an objection to the title, and the application of the trustees and tenants for life for the dividends, did not tend to connect the sale with the trust, but led to a contrary conclusion, inasmuch as the City of London, having the power to require a perfect title under their Act, would not be likely to prefer an imperfect one under the trust.

That there could be no sale pursuant to the trust without a conveyance of the estate by the trustees, and the payment of the purchase-money to them; and if, after the fixing of the price by a jury, there had been a conveyance by the trustees, at the request of the tenant for life, the Court would have held the sale to have been under the trust—*Semble*.

### IN THE MATTER OF TAYLOR'S SETTLEMENT.

THE questions were as to the rights of the parties in a sum of 2397*l.* 2*s.* 8*d.* Consols, purchased with the proceeds of certain freehold houses, bought or taken by the City of London under the *London Bridge Acts*, and which were paid into Court under the provisions of those Acts, and in some dividends which had accrued thereupon.

The houses in question were settled by articles made upon the marriage of *William Taylor* and *Ann Pye*, in the year 1797; and which were afterwards effectuated by indentures of lease and release of the 16th and 17th of July, 1798, made in pursuance of the articles, and indorsed thereon.

The articles bore date the 28th of October, 1797, and were made between *William Taylor* of the first part, *Ann*

*Pye* of the second part, *John Cook* of the third part, and *N. Batten* and *G. Stewart* of the fourth part; and thereby *William Taylor*, with the consent of *Ann Pye* and *John Cook* her guardian, covenanted with *N. Batten* and *G. Stewart*, and *Ann Pye* directed and appointed, that, in case the intended marriage should be solemnised, the said houses and also certain personal estate of *Ann Pye*, therein mentioned, and the rents, dividends, and income thereof, should be held upon the trusts thereafter declared; and that *William Taylor* and *Ann Pye* (she thereby consenting) should, within six months after she should attain her age of twenty-one years, make, levy, and suffer all such deeds, fines, recoveries, and assurances, as should be proper or necessary for destroying her estate tail in the said houses, and enlarging the said estate tail into a fee simple, and assuring the same houses and the personal estate (subject, as to some part of such personal estate, to the life estate therein mentioned,) unto and to the use of *N. Batten* and *G. Stewart*, upon trust, (after certain trusts to lease the houses,) upon the request of *William Taylor* and *Ann Pye* during their joint lives, and, after the death of either, upon the request of the survivor, to sell the same houses in manner therein mentioned, and to invest the monies produced by such sale and the personal estate as therein mentioned, and to stand seised of the said houses until sold, and the personal estate, and the produce thereof, and the produce of the houses, in case the same should be sold, and the rents, dividends, and income thereof, upon trust for *William Taylor* and his assigns for his life, and after his decease, for *Ann Pye* and her assigns for her life, and after the decease of the survivor of them, upon trust to convey the same houses, unless sold, and assign the personal estate, unto or for the benefit of all and every or any one or more of the children and grandchildren or other issue of the said intended marriage (born in the lifetime of *William Taylor* and *Ann* his wife, or one of them), as

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*William Taylor* and *Ann* his wife jointly, or as the survivor of them, should by deed or will appoint; and in default of such appointment, upon trust to convey the same houses, unless sold, and assign the personal estate unto the child, if only one, and if more than one unto or between and amongst all the children of *William Taylor* and *Ann* his wife, equally as tenants in common, and his, her, or their heirs, executors, &c., respectively, with benefit of survivorship in case of the death of sons under twenty-one, or of daughters under that age and unmarried.

*Ann Taylor* attained twenty-one on the 6th of February, 1798; and in or as of Easter Term in that year, a recovery was suffered of the settled property, pursuant to the covenant in the marriage articles, and the settlement indorsed thereon, whereby the houses in question were declared to be vested in *N. Batten* and *G. Stewart*, in fee, upon the trusts expressed in the articles.

There was issue of the marriage nine children, who attained twenty-one.

The Act for the building of *London Bridge* passed in 1823 (a). A further Act was passed in 1827 (b), the provisions of which, so far as they relate to this question, were substantially the same as those in the former Act. The houses comprised in the settlement fell within the provisions of these Acts; and the parties not agreeing as to the price, a jury was summoned, who fixed the price at 2200*l.*, and that sum was paid into the Court of Exchequer under the provisions of the Acts. The Consols in question were the proceeds of this sum.

(a) 4 Geo. 3, c. 50 (Public General). The sections material to this subject are, 18, 24, 26, 27, 34, 35, 38, and 39, which do not greatly differ from the corre-

sponding sections of the Lands Clauses Consolidation Act.

(b) 7 & 8 Geo. 4, c. xxx, (Local and Personal).

In the year 1829, *G. Stewart*, the then surviving trustee of the articles and settlement, and *William Taylor* and *Ann* his wife, the tenants for life, presented their petition to the Court of Exchequer, stating the settlement and the foregoing facts; and that an abstract of the petitioners' title was delivered to the solicitor of the Corporation of *London*, and the same was objected to; and that the petitioners were not able to make a good title to the said messuages and the land whereon the same were standing, to the satisfaction of the said Corporation, although the petitioners and their predecessors in estate had been in possession of the premises, and received the rents thereof, as thereinbefore stated; stating also that the chief, and, as the petitioners believed, the only grounds of objection to their title, were—that it was not deduced back to a period of sixty years prior to the then present time, and that the identity of one of the said messuages was not satisfactorily made out; and praying, that, after payment of the extra costs of the petitioners, the residue of the 2200*l.* might be invested in Consols to the account of the petitioner "*George Stewart*, in the matter of *Taylor's* marriage settlement;" and that the dividends might be paid to *William Taylor*, during his life, and afterwards to *Ann* his wife, for her life, if she should survive her husband. By an order made upon this petition, the proceeds were directed to be invested, and the dividends paid to *William Taylor* during his life.

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In August, 1839, *Charles*, one of the nine children who had attained twenty-one, died intestate, leaving *William Taylor* the father, his heir. In November, 1848, *William*, another of the nine children, also died intestate, leaving two infant daughters, *Jane* and *Mary*, his heirs. His widow administered to him.

In December, 1848, *William Taylor* the father made

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his will, by which he devised his real estate to trustees, upon trust for sale, and directed that the proceeds of such sale should form part of the residue of his personal estate; and he gave the residue of his personal estate to his trustees, upon trust, to get in and receive the same, and sell and dispose of and convert into money all such part or parts as should not consist of monies and securities for money, and to stand possessed of the proceeds thereof, and of all other his residuary personal estate, and the monies to arise from the sale of his real estate, upon trust for his sons and daughters *Henry, Edward, John Seymour, and Horatio, Anna, Caroline, and Emily*, in equal proportions, share and share alike.

*Edward*, one of the sons and residuary legatees, died after the date of the will, but in the lifetime of *William Taylor* the father, whom he left his heir.

*William Taylor* the father died on the 4th of June, 1849, leaving *Ann* his widow surviving, and also leaving *Jane* and *Mary*, the daughters of his son *William*, his co-heirs-at-law. *Ann* the widow died in April, 1850.

The petition was presented by several of the surviving children, stating, that, as to the three ninth parts of *William, Edward, and Charles*, it was doubtful whether the same passed as real or personal estate at the time of their death, and praying for the distribution of the fund.

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Argument.

The question of conversion was argued by

The *Solicitor-General* and Mr. *G. L. Russell* for the petitioners, and

Mr. *Rolt*, Mr. *J. Bailly*, Mr. *W. D. Lewis*, Mr. *Batten*, Mr.

*Ayrton*, and *Mr. Simpson*, for the other parties.—*Triquet v. Thornton* (a), *Thornton v. Hawley* (b), *Phillips v. Phillips* (c), *Jessopp v. Watson* (d), *Fitch v. Weber* (e), *Wrightson v. Macaulay* (f), *In re Cross's Estate* (g), *The Midland Counties Railway Company v. Oswin* (h), *Ex parte Emily Hawkins* (i), and the Treatise on the Law of Property as administered in the House of Lords, pp. 462, 463, were cited.

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Argument.

VICE-CHANCELLOR:—

The first question which was argued, was, whether the estate comprised in the articles and settlement was converted into personalty by the operation of those instruments, or by the joint operation of the instruments and of the Acts of Parliament. The widow and administratrix of *William*, one of the children, contending that it was, and that she was therefore entitled to his ninth of the proceeds; and his daughters and coheirs on the other hand contending that it was not, and that his ninth of the proceeds descended to them as real estate.

Judgment.

I am of opinion that the estate was not converted into personalty by the articles and settlement, or by the conjoined operation of those instruments and of the Acts of Parliament; and that, so far as this point affects the question, the daughters therefore are entitled to this one-ninth as real estate.

With respect to the articles and settlement, taken by themselves, the estate, when put into settlement, was real,

(a) 13 Ves. 345.

(b) 10 Ves. 129.

(c) 1 My. & K. 649.

(d) Id. 665.

(e) 6 Hare, 145.

(f) 4 Hare, 487.

(g) 1 Sim., N. S., 260.

(h) 1 Coll. 74.

(i) 13 Sim. 569.

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and I think it was not meant by the articles or settlement that it should become personal, unless the husband and wife or the survivor of them requested it to be sold. The last provision of the articles appears to me to be decisive upon this point: if sold pursuant to the trusts it was to be personal, and if no such sale took place it was to remain and be considered as real estate, and the sale was to be upon the request of the husband and wife, or the survivor of them.

It was said, that the words of request might be construed as intended merely to enforce on the trustees the obligation of sale; and *Thornton v. Hawley* (a) was cited in support of that view; but I think that case has no bearing upon the present. In that case, there was to be a sale after the deaths of the husband and wife, at the request of the executors or administrators of the survivor; but in the present case, the sale is to be made only on the request of the husband and wife, or the survivor. There is no trust for sale, and no power to sell after the death of the survivor. It is, I think, obvious, that the words of request must in cases of this nature be construed as inserted for the purpose either of enforcing obligation or of giving discretion, as the context of the instrument may require; and to construe them in the present case as inserted merely for the purpose of enforcing obligations would, as it seems to me, be quite inconsistent with the proviso to which I have referred. If, therefore, there has been any conversion of the whole of the estate in the present case, it must, in my opinion, have been by the conjoint operation of the articles and settlement and of the Acts of Parliament, but I think that the articles and settlement and the Acts of Parliament cannot, in the present case, have any conjoint operation. It is clear that this sale was com-

(a) 10 Ves. 129.



pulsory down to the period of the price being fixed by the jury, and if its character was afterwards changed, how happens it that there was no conveyance by the trustees? How could there be a sale pursuant to the trusts without the estate being conveyed by the trustees, and the purchase-money being paid to them? It was attempted to connect the sale both with the Acts of Parliament and with the trusts, by means of the petition; but it is clear from the petition that the money was paid into Court in consequence of a defect, or supposed defect in the title; and this circumstance, so far from connecting the sale with the trust, seems to me to lead directly to the opposite conclusion, for the City had power to acquire a perfect title under the Acts by paying the money into Court; and surely it cannot be supposed, that, having the power to acquire a perfect title under the Acts, they preferred an imperfect one under the trusts. If, indeed, after the price was fixed by the jury, there had been a conveyance to the City by the surviving trustee, on the request of the tenants for life, I am very much disposed to think that the sale must have been considered to have been a sale under the trusts; and I think it my duty therefore to be further satisfied by affidavit upon that point; but in the absence of such a conveyance, I am of opinion that this sale must be considered to be a sale under the Act of Parliament only, and therefore, that the purchase-money was impressed with real uses under the 35th section of the first Act; for I think that the rights of the parties could not be varied by the money being paid in under a different section; and indeed the sections of the Acts under which monies were to be paid in upon defective titles, seem to me to have left it open to the Court to deal with such monies, when paid in, either under any other section of the Acts, or in any other manner which to the Court should seem just.

A further question, which was argued in this case, was,

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whether, supposing that the whole estate was not converted into personalty, *William Taylor*, the father, might not, nevertheless, be held to have elected to take, as personal estate, the two-ninths to which he became entitled as heir to his sons; so that those two-ninths would pass by his will as personal estate: and *Triquet v. Thornton* (a) was cited upon that point. The argument was rested entirely upon the language of the will; and I think the trust for sale does raise some doubt upon it, for it seems difficult to suppose that the testator could intend to include in a trust for sale of real estate what, although in the view of this Court real estate, actually existed in the shape of funded property; but, having regard to the fact that these funds are not the only real estate comprised in the trust, and still more to the fact that the wife, who was living, had a right to insist upon the whole of the funds being actually invested in the purchase of land, I think it would not be a sound construction of the will to hold that this provision amounted to an election by the testator; and I see nothing else in the will which can warrant such a conclusion.

I am of opinion, therefore, that the two-ninths in question were devised by the will of *William Taylor* as real estate; and I think it clear that his will did not operate an out and out conversion, so as to entitle his next of kin, as against his heirs, to the one-seventh which lapsed by the death of *Edward*. It operated conversion only for the purposes of the will; and the daughters, therefore, are entitled to that one-seventh of two-ninths.

A question was then raised, whether the daughters took this share as real or personal estate. This point is not, I think, ripe for decision; but I have no doubt upon it. The daughters take their share as personal estate.

(a) 13 Ves. 345.

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## JONES v. MAGGS.

March 12th,  
16th, & 27th.

*ANN JONES*, by her will, dated in 1826, gave to the Defendant *Maggs* and another her residuary estate, upon trust, to invest 200*l.* in 4*l.* per cent. Annuities, and to receive and invest the dividends arising therefrom from time to time in the same stock, to form an accumulating fund, until the child of her brother *T. P. Jones* should attain twenty-one; and on that event, upon trust to divide the said stock, with its accumulations, in equal shares, between all the children of her said brother who should then be living, and, if only one of such children should then be living, to pay the same to such child; and the testatrix gave her residuary estate, after the investment of the 200*l.*, to her said brother.

The testatrix died in 1826, and left her said brother *T. P. Jones* her sole next of kin. *T. P. Jones* was married at the death of the testatrix, and had one child, who afterwards died in infancy, and he had no other issue. *T. P. Jones* married a second wife, who, at the time the claim was filed, was forty-three years of age, the husband being about sixty. The fund was increased to 373*l.* 6*s.* 6*d.* New 3½ per Cents.

*T. P. Jones*, in 1850, filed his claim for the dividends which had accrued subsequently to the expiration of twenty-one years from the death of the testatrix.

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Mr. *E. F. Smith* for the Plaintiff.

legatee was held to be entitled, at the expiration of twenty-one years, to the accumulations of a legacy given to the children of the testatrix's brother, and directed to be divided amongst them when they should attain twenty-one.

Where a gift to children is not made or secured to them out of property springing from or settled upon their parents, and there is nothing in the nature or context of the instrument to impress upon the gift the character of a portion, it is not a portion within the meaning of the 2nd section of the *Thelluson Act*; and the circumstance, that the gift is a part of the estate of which the parent is the residuary legatee, has not the effect of giving to the gift the character of a portion.

There is no reason, and it is contrary to the policy of the *Thelluson Act*, to put a strained or forced construction on the term "portions for children" contained in the 2nd section of that Act.

Under the *Thelluson Act*, the residuary

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*Argument.*

*Mr. Karlake* for the Defendant, the trustee, representing the interests of unborn children of the Plaintiff.

*Longdon v. Simson* (a), *Haley v. Bannister* (b), *Holland v. Prior* (c), *Shaw v. Rhodes* (d), *O'Neill v. Lucas* (e), *Eyre v. Marsden* (f), *Ellis v. Maxwell* (g), *Elborne v. Goode* (h), *The Corporation of Bridgnorth v. Collins* (i), *Halford v. Stains* (k), *Beech v. Lord St. Vincent* (l), *Morgan v. Morgan* (m), *Wilson v. Wilson* (n), *Bourne v. Buckton* (o), and *Hargrave Thell. Act*, pp. 119, 196, and 1 *Jarman on Wills*, 270, were cited.

*Judgment.*

VICE-CHANCELLOR:—

There is no doubt in this case that there can be no further accumulation of the dividends of this sum of stock, consistently with the *Thelluson Act* (p), unless the clause which directs it be within the protection of the second section of that Act. The only part of the second section which is applicable, is this: "Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that

(a) 12 Ves. 295.

(b) 4 Madd. 275.

(c) 1 My. &amp; K. 237.

(d) 1 My. &amp; Cr. 135.

(e) 2 Keen, 813.

(f) 2 Keen, 564.

(g) 3 Beav. 587, 596.

(h) 14 Sim. 165.

(i) 15 Sim. 538.

(k) 16 Sim. 488.

(l) Before V.-C. *Knight Bruce*,  
26 Jan. 1850.(m) Before V.-C. *Knight Bruce*,  
14 Jan. 1851.

(n) 1 Sim., N. S., 288.

(o) 2 Sim., N. S., 91.

(p) 39 &amp; 40 Geo. 3, c. 98.

all such provisions and directions shall and may be made and given as if this Act had not passed."

The question then is, whether the sum of 200*l.* here given, and the dividends and accumulations, be or be not a portion within the meaning of that section. I see no reason for putting a strained interpretation upon the expression "portions for children," used in this Act. It would be contrary to the policy of the Act to do so, and would afford a ready means of escaping from its provisions.

Is this then a provision for raising portions within the fair meaning of the words of the Act? I think not. Portions for children are, I think, generally understood to be sums of money secured to them out of property springing from or settled upon their parents; and although there may, no doubt, be cases in which provisions for children out of property in which the parents take no interest may well be called portions, I think that such provisions would only receive that designation where the nature or context of the instrument gives them that character. Where there is a gift to children both of capital and income, and there is nothing in the nature or context of the instrument to impress upon the gift the character of a portion, I do not think it would be called a portion in the ordinary sense of the word, or ought to be so considered within the meaning of this Act of Parliament; and the cases of *Eyre v. Marsden* (a) and *Bourne v. Buckton* (b) support this view. In the present case, the whole of the 200*l.*, with all the accumulations upon it, is given to the children; and there is clearly nothing in the nature of the instrument by which the gift is made, to impress upon it the character of a portion.

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(a) 2 Keen, 564.

(b) 2 Sim., N. S., 91.

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It was said, however, that the context of the will impressed that character upon the gift, as the residue is given to the parent, and the legacy would be a deduction from the residue; but when it is said that the legacy is a deduction from the residue, it is so in no other sense than that the residue would be greater if the legacy was not given. The legacy is given out of the general estate, and not out of the residue, and if this legacy is to be construed to be a portion, every legacy given to a child of a residuary legatee must, as it seems to me, be so construed, and thus the Act would be wholly defeated.

The case of *Beech v. Lord St. Vincent* has not, I think, any bearing upon the question. There the parent took the estate out of which the provision for the children was made, and the provisions for the children had in every respect the character of portions. I must, in this case, declare the Plaintiff entitled, as residuary legatee, to the dividends which accrued due after the expiration of twenty-one years from the decease of the testatrix.

1852.

## BURROUGHES v. BROWNE.

THE Plaintiffs were the vendors of an estate, which was put up to sale by public auction on the 14th of May, 1847. One of the conditions of sale provided, that each purchaser should, immediately after the sale, pay to the Plaintiffs' agent, and who was in fact one of the vendors, 10*l.* per cent., in part of the purchase-money, and should pay the remainder of the purchase-money on the 11th of October then next. That, on payment of the remainder, each purchaser should be entitled to a conveyance and possession; that all outgoings, to the 11th of October, should be paid by the vendors; and if the purchase should not be then completed, each purchaser should from that day pay to the vendors interest on the purchase-money unpaid, at the rate of 5*l.* per cent. per annum. The Defendant became the purchaser of Lot 16, at the auction, for 3650*l.*, and paid the deposit of 365*l.* Soon afterwards, 3280*l.*, the whole balance of the purchase-money, with the exception of 5*l.*, was laid out in the purchase of stock; and the stock having greatly risen in value, the Plaintiffs filed their bill in June, 1851, against the purchaser, praying a specific performance of the contract, and a transfer of the stock, and of the dividends which had accumulated thereon. The only question was, whether the Plaintiffs, the vendors, were entitled to the benefit resulting from the investment.

The investment was made under the following circumstances: The abstract having been delivered, and it appearing that there would be difficulties in the completion of the purchase, the purchaser's solicitor, on the 25th of September, 1847, wrote a letter to the Plaintiffs' agent,

vendor in respect of the purchase-money, the money paid becomes the property of the vendor, so that the purchaser can claim no benefit of any investment which the vendor may make.

*March 13th  
& 25th.*

Pending a dispute respecting the title to land contracted to be sold, and to avoid the question as to the interest of the purchase-money, the vendor gave the purchaser the opportunity of investing the purchase-money in Consols in the joint names of the vendor and purchaser, provided the investment was made by a certain day, and the purchaser made the investment accordingly:—*Held*, that the vendor, having proposed the investment, could not have charged the purchaser with the loss, if the funds had fallen, and that the vendor was entitled to the benefit accruing from the funds having risen.

A purchaser cannot throw upon a vendor the risk of an investment of the purchase-money; and if he makes a payment to or on account of the

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who throughout acted as the vendors' solicitor, in which he said that his client's money was in the bank, and that if the requisitions were not complied with, and the purchase completed by the time fixed, he would not pay more than bank interest. In answer to this letter the Plaintiffs' solicitor said, that his clients would require 5*l*. per cent. interest from the 11th of October on the unpaid purchase-money. On the 8th of October the Defendant's solicitor again wrote to the Plaintiffs' solicitor, and, after referring to the differences which existed, said: "Would it not be better for all parties to leave the points in difference to some eminent conveyancer, and in the meantime, to avoid the question of interest, to invest the purchase money in the usual way." To this the Plaintiffs' solicitor replied, on the 19th of October: "As the purchase ought to be completed on the 11th instant, I shall abide entirely by the conditions; and if I think it necessary to take an opinion of counsel, I shall take it for the vendors only." On the 20th of October the purchaser's solicitor again wrote to the vendors' solicitor, and repeated, that, his client's money having been ready at his banker's, and making only a small interest, he would not consent to pay more than his money made. And to this letter the vendors' solicitor replied on the 21st of October: "I shall require 5*l*. per cent. interest from the 11th instant; but, as I have given Messrs. *Mitchell & Clarke* (who were concerned for purchasers of other lots), the opportunity of investing their clients' purchase-money in Consols, in the joint names of one of their firm and myself, provided the same be invested by this day, I will give your client a similar privilege, provided he invests it before Wednesday next, and forthwith sends me the stock receipt." On the 23rd of October the purchaser's solicitor wrote to the vendors' solicitor that he had given instructions for the investment of the balance of the purchase-money in the joint names of the purchaser and the vendors' solicitor; and the latter



in his reply, dated the 27th of October, said, "I am glad to hear you have invested the money, and I shall be still better pleased if it was invested on Saturday last, as it should have been." On the same day the purchaser's solicitor sent the stock receipt to the Plaintiffs' solicitor, intimating at the same time, that, by a mistake, a less sum than the balance by about 5*l.* had been invested, adding, "the increased price of the funds will make this however a matter of no consequence. I will thank you to acknowledge the receipt of the stock receipt per return of post, and to state in yours briefly that it is the balance of Mr. *Browne's* purchase-money; and that it has been invested in your joint names to avoid the question of interest, and to be kept invested until certain points in difference as to the title shall be determined and the purchase completed." To this the vendors' solicitor replied, on the 28th of October, acknowledging the stock receipt, and afterwards, on the 30th of October, more fully as follows: "I acknowledge that the sum of 3279*l.* 18*s.* 10*d.* sterling, invested by you in the joint names of myself and Mr. *Browne*, is on account of the purchase-money of Lot 16 of the estate belonging to the *Burroughes'* family, purchased by Mr. *Browne* on the 14th of May last."

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The correspondence between the parties related to the title, without reference to the invested fund, until the 8th of April, 1848, when the vendors' solicitor wrote to the purchaser's solicitor—"I presume your client will not object to execute a power of attorney to receive the dividends of the stock invested in my name and his. The abstract, with your observations, is before Mr. *Jarman*." In answer to this, the purchaser's solicitor replied—"I have seen Mr. *Browne* to-day, and as your papers are before counsel he hopes the whole matter will shortly be wound up; and unless, therefore, it be at all a matter of moment with your clients, he would prefer letting the dividends

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stand over until a final settlement takes place." On the 17th of the same month, the vendors' solicitor again wrote: "Mrs. *Burroughes*' income is very limited, and she will sustain very serious inconvenience if she receives neither rent nor interest for her *Wymondham* estate. Notwithstanding the investment of the money, I conceive that Mr. *Browne* is a trespasser, for having continued in possession after the expiration of the notice to quit; and, therefore, if he will not give facility to the receipt of the dividends by Mrs. *Burroughes*, I must, in self-defence, take such steps as I legally may for the recovery of the possession of the land. If he acquiesces in my proposal I shall be satisfied. I am very anxious to bring the matter to as early a settlement as possible; but when once it becomes necessary to consult conveyancers, it is impossible to say when a settlement may be expected." The subsequent correspondence did not affect the question in the suit.

Argument.

Sir *W. P. Wood* and Mr. *Hislop Clarke*, for the Plaintiffs.

Mr. *Rolt* and Mr. *Fooks*, for the Defendant.

*Doyley v. Countess of Powis* (a), *Poole v. Rudd* (b), *Roberts v. Massey* (c), *Acland v. Gaisford* (d), *Gell v. Watson* (e), *Salisbury v. Hatcher* (f), *Humphries v. Horne* (g), *Monro v. Taylor* (h), and *De Visne v. De Visne* (i), were referred to.

Judgment.

VICE-CHANCELLOR:—

This question must, I think, depend on what was the

- (a) 2 Bro. C. C. 32.
- (b) 3 Bro. C. C. 49.
- (c) 13 Ves. 561.
- (d) 2 Madd. 28.
- (e) 2 S. & S. 402.

- (f) 2 Y. & C. C. C. 54.
- (g) 3 Hare, 276.
- (h) 8 Hare, 51.
- (i) 1 Mac. & G. 336.

true meaning of the agreement between the parties, and not upon any general rule of law as to the effect of the investment of purchase-money; for, the parties having come to an agreement upon the subject, I think that their rights must be governed by the agreement into which they have entered; and the general rules of law can be looked at only so far as they may throw light upon the terms of the agreement.

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*Judgment.*

The general rules upon the subject do not appear to me to be open to much doubt. A purchaser cannot throw upon the vendor the risque of an investment; but if he makes a payment to or on account of the vendor, in respect of the purchase, the money paid becomes the property of the vendor, to the extent at least that the purchaser can claim no benefit of any investment which the vendor may make. The general practice of the Court illustrates these rules. The purchaser moves to pay in the purchase-money, and the vendor prays that it may be laid out; and the rules are, I think, well founded in principle, for, ordinarily speaking, when the purchase is completed the estate becomes the purchaser's and the money the vendor's from the date of the contract; and it is difficult to see on what ground the purchaser can be entitled to speculate with the vendor's money, any more than the vendor is entitled to speculate with the purchaser's estate.

These rules, however, have but little bearing on the present case, which depends, as I have already observed, upon the agreement entered into between the parties. That agreement is to be found in the letters which passed between the solicitors; and before considering them, it is material to observe the position in which the parties stood. On the one hand, the purchaser was liable to be called upon to pay 5*l.* per cent. upon the purchase money, according to the conditions; and on the other hand, the vendor

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*Judgment.*

was threatened with the risk of getting no interest, or but little interest by the purchaser's keeping the money idle, or at his banker's; and in this state of circumstances the vendor requiring the 5*l.* per cent., and the purchaser insisting that he would be liable for banker's interest only, the purchaser proposes to refer the question of title, and in the meantime, to avoid the question of interest, to invest the purchase money in the usual way. Some observation was made in the argument upon the words "in the usual way;" but I think they meant no more than, according to the usual mode of investment in cases of dispute,—investment in joint names. The vendor, not accepting this offer of the purchaser, still insists upon the 5*l.* per cent. interest, but offers the purchaser the opportunity of investing the purchase money in Consols in joint names, provided the investment be made by a certain day; and the purchaser immediately acts upon the offer and directs the investment to be made. The investment is made, except as to 5*l.*, which is by mistake omitted to be invested; and the purchaser then sends the stock receipt to the vendor, and writes, that he had directed the whole money to be invested, but that less by about 5*l.* had been invested, adding, "the increased price of the funds will make this, however, a matter of no importance;" and he desires an acknowledgment of the stock receipt; that it is the balance of the purchase money, and has been invested in the joint names to avoid the question of interest, and to be kept invested until certain points in difference as to the title shall be determined, and the purchase completed; and thereupon the vendor acknowledges the stock receipt, and that the sum invested is on account of the purchase money. What, then, is the agreement to be collected from this correspondence? The proposal of the vendor is clear, and it is equally clear that the purchaser accepted it; for he immediately acted upon it, and subsequently takes the trouble to explain why it was not fully carried out; but it

is said on his behalf, that the investment was to avoid the question of interest, and this no doubt was the case. Does it however follow, that, because the investment was to avoid the question of interest, it was not meant that the invested fund should belong to the vendor upon the completion of the purchase? I think not. The fair inference appears to me to be the other way: that the vendor, who was undoubtedly to receive the interest of the fund invested, was to receive the capital from which that interest arose; but what appears to me to be decisive on this part of the case is, that the vendor, having proposed the investment, could not, I think, by any possibility have charged the purchaser with the loss if the funds had fallen; and if he would have been subject to the loss had the funds fallen, he must, I think, be entitled to the benefit resulting from their having risen: *Acland v. Gaisford* (a).

It was said, however, for the purchaser, that the observation in his letter inclosing the stock receipt, that the increase in the price of funds would make the non-investment of the 5*l.* a matter of no importance, shewed the character of the transaction, and that the investment was for security only; but this letter was written after the purchaser had acted on the vendor's proposal, and had made the investment; and I think, therefore, it could not be intended to alter the terms on which the investment was made; and, at all events, I think that this expression ought not to be construed to have altered the terms of the investment, if any other reasonable construction can be put upon it. It is a reasonable construction of the expression, that the purchaser, having failed to invest the whole of the purchase money, meant to say, that, the funds having risen, the non-investment of so small a part would be compensated to the vendor by the rise; and, coupling

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(a) 2 Madd. 28.

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the expression with the context, I believe that this was what the purchaser really intended to express.

Some attempt was made on the part of the Defendant to raise a question as to the authority of the vendor's solicitor to enter into the arrangement, but this point is not raised by the pleadings; and further, I see no reason why it was not competent to the vendors to adopt the acts of their agent and solicitor. My opinion, therefore, is, that the vendors are entitled to the benefit of the investment, and the decree must be accordingly. The costs must be paid by the Defendant.

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Jan. 30th.

IN THE MATTER OF HEATH, a Bankrupt.

Order by the Vice-Chancellor,—and not by the Court sitting in Bankruptcy,—for the appointment of new trustees in the place of a bankrupt trustee, and the payment of the trust funds to such new trustees, under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 130.

THIS petition was intituled also In the Matter of the Bankrupt Law Consolidation Act, 1849, and In the Matter of *John Ginder's* Settlement and of the Trustee Act, 1850.

The petitioners were *Martha Titley*, her husband, and children. It appeared, that, by a settlement, made by *John Ginder* in 1821, an estate was charged with 500*l.*, which sum was vested in *Heath* and *Poyser*, upon trust to lay out the same in Government or real security, and pay the interest or dividends to *Martha Titley* for her life, and upon her decease to divide the sum amongst her children; that *Heath* became bankrupt in 1822; and that, in 1829, the 500*l.* was paid to *Poyser*, and lent by him to *Rupert Titley*, the husband of *Martha*, upon the joint and several bond of *Rupert Titley* and another; that *Poyser* died in 1833, leaving *Heath* surviving; and that there was no power in the settlement to appoint new trustees. The petition alleged, that there was no person entitled to sue upon the

bond, or give a discharge for the 500*l*.; and prayed that *Heath* might be removed from being a trustee, and two other persons appointed trustees of the 500*l*.; and that the right to sue for the said sum and interest might be vested in them, and a proper declaration of trust executed.

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Statement.

Mr. *Campbell* and Mr. *Cracknell* for the petition,—on the suggestion, that the application should be properly made to the Lords Justices, to whom jurisdiction in bankruptcy had been committed,—referred to the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, ss. 130 and 276, under which many orders had been made by the Vice-Chancellor not sitting in bankruptcy (a).

Argument.

Mr. *Sydney Smith* for the bankrupt.

The VICE-CHANCELLOR said, that, as the jurisdiction had been exercised by his predecessors, he would not take upon himself to throw any doubt upon it; and he made the order for the appointment of new trustees, and, upon the consent of the obligor in the bond, ordered the 500*l*. to be paid to them.

Judgment.

(a) The following among other instances had been collected: *In re Lamdin*, 16th March, 1849, Reg. Lib. A., 1849, fo. 999; *In re Haskeyne*, 25th March, 1850, Reg. Lib. A., 1849, fo. 1090; *In re Flood*, 9th

Feb., 1850, Reg. Lib. A., 1849, fo. 1086. See the several statutes, 36 Geo. 3, c. 90, s. 1; 6 Geo. 4, c. 16, s. 79; 1 & 2 Will. 4, c. 56, s. 2; and 10 & 11 Vict. c. 102, s. 2.

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*April 15th.*FLINT *v.* WOODIN.

The Court may not decree specific performance of a contract for the sale of a reversion, if the vendor had misled the purchaser by stating that it was subject to a lease containing all the usual covenants for repairs, &c., the vendor knowing, at the same time, that there was no person against whom the covenants could be enforced; but where property is sold subject to a lease so described, and tenants are in possession of the property, and pay their rent according to the terms of the lease, and the vendor is not aware, at the time of the contract, of any

difficulty in enforcing the covenants, the Court will not refuse to decree specific performance, on the ground that the vendor cannot shew upon whom the liability of the covenants in the lease has devolved; and the vendor is not bound to find out, and acquaint the purchaser with, the name of the party who may be liable to such covenants.

Though a puffer ought not to be employed to screw up the price, or take advantage of the ignorance of other bidders, yet a progressive bidding to a fixed or reserved bidding by a person employed by the vendor, without the knowledge of the other bidders, will not necessarily be deemed to be taking an advantage of their ignorance.

A party to a contract becoming aware of an objection to the validity of the contract, must forthwith state it as an objection on which he means to resist performance of the contract; or if, after such knowledge, he treats the contract as subsisting, he will be considered to have waived the objection.

Though the auctioneer at a sale by auction is the agent of the purchaser, yet he is not his agent for all purposes; and there is no reason why he may not sell property of which he is himself the owner, *Semb.*

**A** CLAIM by the vendor for the specific performance of a contract for the purchase of three houses, forming Lot 5, at a sale by auction on the 12th of August, 1851. The Defendant bid 700*l.*, which was the highest bidding, and signed an agreement for the purchase, and paid the deposit of 20*l.* per cent. The property was described in the particulars of sale as let upon lease, containing all the usual covenants to repair, &c., at a ground rent of 18*l.* per annum, for a term, which would expire at Christmas, 1852, when seventy guineas per annum might readily be had.

The objections, by way of defence, were, first, that the Defendant had been induced to enter into the contract at the strong recommendation of the Plaintiff, whom he did not then know to be the owner, but believed to be only the auctioneer, and a disinterested person; and that the Plaintiff, in the course of the conversation, had ascertained how much the Defendant would probably give for the property, and regulated his reserved bidding accordingly. Secondly, that the Plaintiff had at the sale acted as the auctioneer, and concealed the fact of his being the owner. Thirdly, that the sale was improperly conducted,



some of the biddings having been made by agents of the vendor to raise the value. And lastly, supposing the contract to be otherwise valid, that there was no sufficient evidence of the existence of any lease, nor was it shewn that there was any person in the position of lessee or assignee of the alleged lease against whom the covenants could be enforced, this being of great importance to the Defendant, as the premises were in a dilapidated state, and the expense of the necessary repairs was estimated at 200*l*.

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—  
*Statement.*

The affidavit of the Defendant stated that he had not made such inquiries as to the property as he would have done if he had suspected the Plaintiff to have been the owner; and that he (the Defendant) believed that the auction was not conducted *bonâ fide*, for that some of the biddings were not real.

It was stated by the Plaintiff's affidavit that one person only was employed to prevent a sale below the reserved bidding of 695*l*; that there were thirty persons at the sale, and a fair competition amongst the bidders; that there were at least four *bonâ fide* bidders, including the Defendant; and that there were twenty-four biddings.

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Sir *W. P. Wood* and Mr. *Boyle* for the Plaintiff.

*Argument.*

Mr. *Daniel* and Mr. *Smale*, for the Defendant, argued, that the Court would not enforce a contract so obtained. The Defendant had been entirely thrown off his guard, from having been kept in ignorance of the fact that he was receiving information concerning the property and its value from the owner himself; that, by these means, the Defendant had, throughout the transaction, dealt at a disadvantage; that, moreover, the employment of a puffer at the sale was a contrivance to screw up the price; and

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*Argument.*

this aggravated the disadvantage under which the Defendant laboured, from the concealment of the true relation of the auctioneer and vendor; that an auctioneer was, in fact, an agent for the purchaser: *White v. Proctor* (a); and that the representation as to the lease and covenants, when no lessee or covenantee could be found, was in the nature of a delusion and fraud: *Symons v. James* (b). On the point as to the biddings by the puffer or agent for the vendor, *Bramley v. Alt* (c), *Conolly v. Parsons* (d), *Smith v. Clarke* (e), and Sugd. V. & P. (Conc. V.) pp. 8, 9, 152, were cited; and on the question, whether an objection to the validity of the contract was still open to the purchaser, *Hobson v. Bell* (f) and *Blacklow v. Laws* (g).

*Judgment.*  
 ———

VICE-CHANCELLOR:—

The question arises on a claim for specific performance of a contract for the purchase of certain houses in *Bagnigge Wells Road*. The purchaser has taken three objections to the claim. The first objection goes to impeach the title of the vendor. The other two impeach the validity of the contract.

It is objected,—first, that there is no person to answer and perform the covenants contained in an existing lease of the property; secondly, that the vendor was himself the auctioneer at the sale, and that this fact was unknown to the purchaser; and thirdly, that there was a puffer employed at the sale, also without the knowledge of the purchaser.

(a) 4 Taunt. 209.

(b) 1 Y. & C. C. O. 487.

(c) 3 Ves. 620.

(d) *Id.* 625, n.

(e) 12 Ves. 477.

(f) 2 Beav. 17.

(g) 2 Hare, 40.

As to the first objection,—the property, when put up for sale, was described as property held subject to a lease. It is not the leasehold interest, but the reversion, which was sold. The property is described as a “brick-built house, of copyhold tenure;” and the description goes on to say, “this desirable estate is sold subject to a lease containing all the usual covenants to repair, at a ground-rent of 18*l.* per annum, for a term that will expire at Christmas, 1852.” Now, I agree, that if a vendor offer property for sale, describing it as being “let on a lease containing all the usual covenants to repair,” knowing that there is no person who can be made liable upon the covenants, that might well be considered as a delusive representation on the part of the vendor,—for a representation, that the lease contains the usual covenants to repair, is likely to lead the purchaser to conclude that those covenants will be duly performed. If the vendor know at the time that the covenants in the lease cannot be enforced, that may be a ground on which the Court would refuse to interfere to compel a specific performance of the agreement in his favour. But that is a case to be made out on the evidence. Now, in this case, a counterpart of the original lease, granted in 1791, is produced; the rent under that lease has been received, and there are two persons now in possession of two of the houses comprised in and demised by that lease, and paying the rent. In such a state of things I cannot possibly hold that the representation made, with regard to the lease, by the particulars of sale, is anything like a fraudulent misrepresentation, such as would lead the Court to refuse a specific performance of the agreement. The purchaser might have made inquiries of the occupants of the houses, if he had considered it important to do so, or if he had considered the relation in which they stood to be a material ingredient to be taken into account in determining what price he would bid.

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 v.  
 WOODIN.  
 —  
*Judgment.*

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Judgment.

The second objection is, that the vendor himself acted as auctioneer at the sale, the purchaser not being then aware who was the real owner of the property sold. It is said, that, at a sale by auction, the auctioneer is the agent of the purchaser, and that the vendor cannot, except under very extraordinary circumstances, act as the agent of the purchaser. It is quite true, that the auctioneer is, at such a sale, the agent of the purchaser, but he is not his agent for all purposes. The auctioneer, as it seems to me, may properly hold the character of owner, without any objection being taken to the sale on that ground. But if that were any ground of objection under ordinary circumstances, the subsequent transactions completely prevent the defendant from raising it in this case. The sale took place on the 12th of August, the abstract was delivered to the purchaser's solicitor on the 21st, which gave him the fullest notice that the auctioneer was himself the owner and vendor; and, in September, the defendant had personally distinct notice of the same fact. If the purchaser had meant to insist on this objection, he ought to have raised it at once, and stated it as an objection on which he meant to rely; and not having done so, I think that the objection, if any it be, must be taken to have been waived. I consider that a purchaser, knowing of an objection of this description to the validity of a contract, cannot lie by and afterwards attempt to avail himself of it. The instant that such an objection comes to the knowledge of a party, he is bound immediately to insist upon it, if he intends to rely on it at all. He cannot at one time treat the contract as subsisting, and then afterwards turn round and say there never was any contract.

The last objection was, that a puffer was employed at the sale. I have, in the course of the argument, given much consideration to the question, whether the fact of there being a person bidding, through a long series of bid-

dings down to their final close, might not affect the case. I was rather struck at the time with the view taken by Sir *W. Grant* in the case of *Smith v. Clarke* (a), where he says, "A bidder cannot be employed to screw up the price, or take advantage of the ignorance of the bidders." We must, to apply this rule, first determine the question, whether the bidder was employed to screw up the price, or take advantage of the ignorance of other bidders. I cannot draw this inference merely from the fact of his having bid against the last *bonâ fide* bidder, through a long series of biddings. It is not to be expected that a person employed to bid for property up to a certain sum, say 700*l.*, is to bid at once 695*l.*: he would rather bid gradually up to 695*l.*; and if after that no *bonâ fide* bidder offers against him, that fact alone should not lead to the conclusion that he is screwing up the price, or taking advantage of the ignorance of others.

It was then argued, that the reserved bidding was fixed, with a knowledge that there would be a sum of 700*l.* bid for the houses,—it having been ascertained that the Defendant was likely to bid that sum; and that it was fraudulent to force the price up to that sum by a person who was not a *bonâ fide* bidder. Looking to the affidavit of the Defendant on this point, I find no more than this,—that he, having gone to the Plaintiff, the auctioneer, upon other business, for the purpose of receiving rent for other property with which he was concerned, asked him some questions about this property, which was then advertised for sale, and inquired what he thought the premises would be sold for,—whether they would be sold for about 700*l.* The Plaintiff (the vendor) replied, that he thought they possibly might, but he did not think they would be sold for less; and that the Plaintiff then recommended the purchase in strong terms to the Defendant, and said he would find it cheap. This took place on the 7th

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 Judgment.

(a) 12 Ves. 483.

## CASES IN CHANCERY.

August, and the sale was not until the 12th of August; and yet, in that interval, the Defendant does not look at the property, or make any further inquiry, but he relies on the representation which he had received. Now, there was nothing in that conversation which can be made the subject of objection; the Defendant merely makes the inquiry, will it sell for 700*l*? It is no fraud for a vendor, being also the auctioneer, when a party comes to him and makes an inquiry whether the property will be sold for 700*l*, to say that it probably would, or afterwards to fix the reserved bidding at that sum. It was open to the purchaser to make such inquiries as he thought necessary.

I think, upon these grounds, I cannot refuse to make a decree for specific performance of the contract; and though I have had some doubt on the point of costs, I think I shall not do justice unless I give costs against the purchaser.

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*March 27th.* IN THE MATTER OF THE MAGDALEN LAND CHARITY, HASTINGS, AND OF THE STAT. 52 GEO. 3, c. 101 (a).

After a distribution of charity funds for more than two centuries among the poor of certain parishes, an adverse claim on behalf of other parishes to participate in the benefit of the charity is not properly brought forward by petition under Sir Samuel

A FARM, comprising a barn and fifty-eight acres of land, in the liberties of the town and port of *Hastings*, was, in the time of Queen *Elizabeth*, vested in the Mayor, Jurats, and Commonalty of *Hastings*. No deed or instrument appropriating the rents to any charitable purposes appeared to exist, but they were not applied to corporate purposes; and the evidence of their application shewed that they had been paid to the churchwardens of the parishes of *St. Clement* and of *All Saints*, the two parishes in the town and port of *Hastings*, by whom they were distributed at

*Romilly's Act*, but is properly the subject of an information.

(a) Sir Samuel Romilly's Act.

Easter and Christmas, in every year, amongst the poor of those parishes. No other appropriation of the surplus rents appeared to have been made for a period of 240 years. In 1836 new trustees were appointed, under the Municipal Corporation Act.

1852.  
 In re  
 MAGDALEN  
 LAND CHARITY,  
 AND STAT.  
 52 GEO. 3, c.  
 101.

*Statement.*

The liberties of the town and port of *Hastings* contained several other parishes, not within the "town and port" itself. In January, 1852, a petition was presented by persons who were parishioners of parishes within the liberties, but not within the town and port, not stating that the rents of the charity lands had been applied for so long a period to the two parishes exclusively, but stating a memorial made by the Corporation of *Hastings* in 1812, under the Stat. 52 Geo. 3, c. 102 (a), in which the objects of the endowment were stated to be the poor of the "town and port of *Hastings*," and praying an inquiry of what were the proper objects of the charity, and a direction for a scheme for the future application of the income. The trustees were served with the petition, and did not oppose it; but the churchwardens of *St. Clement* and *All Saints* were not served with it. The Court, upon this petition, referred it to the Master to inquire what parishes there were within the town and port of *Hastings*, and how the income of the charity had been applied, and directed the Master to settle a scheme.

The churchwardens of *St. Clement* and *All Saints*, upon being informed of the proceeding which had been taken, presented their petition, stating the uniform application of the surplus charity funds to the poor of their respective parishes for 240 years; and that there were in fact no other parishes within the town and port, although there were

(a) An Act for the regulating and securing of charitable donations.

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 In re  
 MAGDALEN  
 LAND CHARITY,  
 AND STAT.  
 52 GEO. 3, c.  
 101.  
 Argument.

other parishes within the liberties; and praying that the order on the former petition might be discharged.

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Sir *W. P. Wood* and Mr. *Pitman* for the petition.

Mr. *Welch* for the trustees.

Mr. *W. M. James* for the Attorney-General.

Mr. *Baily* for the petitioners in the former petition.

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*Judgment.*

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The VICE-CHANCELLOR said, that, after the funds of the charity had been distributed for so long a period among the poor of the two parishes, if a claim were set up by the poor of other parishes, the case was not one to be decided under Sir *Samuel Romilly's* Act; and that, in the case of an adverse claim, the *Attorney-General* must be a party to the proceeding, notwithstanding the parties before the Court might have divided interests. The only evidence that the Corporation were trustees for the poor of the town and port of *Hastings*, appeared to be an ancient memorial; and that document might admit of explanation, if the case were brought before the Court upon an information stating that the Corporation had distributed the funds among the two parishes only, and contending, upon that memorial, that the two parishes within the town and port of *Hastings* were not entitled to the fund, exclusive of the other parishes within the liberties. The order made on the former petition must be discharged, as it had been made adversely. If the parties thought that nothing could be added to the facts before him, he had no objection to state his opinion, that, on the evidence which had been produced, after the property had been applied for so long



a period to the poor of those two parishes, they alone were entitled to it.

A declaration to the above effect was made, by consent of the *Attorney-General*, the petitioners, and respondents; and a reference was directed to settle a scheme.

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In re  
MAGDALEN  
LAND CHARITY,  
AND STAT.  
52 GEO. 3, c.  
101.  
*Judgment.*

PADWICK v. STANLEY.

A BILL by a solicitor and agent against his client and principal, for an account of monies and liabilities which the Plaintiff stated he had raised, advanced, and incurred for the Defendant, by means of bills, notes, and otherwise, and the particulars of which, he alleged, were very complicated; and for a discovery of letters and documents relating to such transactions, which the bill averred that the Plaintiff had from time to time written and given up to the Defendant, and of divers of which the Plaintiff stated he had no copies. The bill sought to have the balance of the account paid, and that the Plaintiff might be discharged from such alleged outstanding liabilities. The Defendant demurred.

June 7th &  
8th.

It does not follow, that, because a principal is entitled to have an account taken in equity as against his agent, the agent has a similar right against his principal; for the right of the principal rests on the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal.

The case in which a surety has a right to sue his principal in equity to be discharged from his liability, is where the creditor has a right to sue his debtor, and refuses to exercise that right.  
—*Semble.*

Mr. *Stuart* and Mr. *Bates* for the demurrer.

Mr. *Rolt* and Mr. *Amphlett* for the bill.

The cases which were cited in *Phillips v. Phillips* (a), where the point was the same, were cited in this case, and also *O'Mahony v. Dickson* (b), *Foley v. Hill* (c), and *Pearce v. Creswick* (d).

(a) *Supra*, p. 473.

(b) 2 Sch. & Lef. 400.

(c) 2 H. L. Cas. 28; S. C., 1 Ph. 399.

(d) 2 Hare, 286.

1852.

PADWICK  
v.  
STANLEY.*Argument.*

In the present case it was also argued, that the bill could be supported on the ground that the Plaintiff, by being a party to bills and notes on the Defendant's account, had become a surety, and was entitled to be exonerated: *Antrobus v. Davidson* (a), *Lee v. Rook* (b), and *Earl Ranelagh v. Hayes* (c).

*Judgment.*

The VICE-CHANCELLOR expressed the same opinion as in his judgment in *Phillips v. Phillips* (d), with regard to the right to sue in equity, founded on mutual accounts. On the other points, his Honour said:—

It was sought to support this bill on the right of a surety to be discharged from his liability. I have not the least intention to say anything which could prejudice such a right; but I conceive that the cases in which such a jurisdiction is exercised by this Court, are cases where the creditor has a right to sue the debtor, and refuses to exercise that right. It does not appear, upon this bill, that the creditor has any present right to sue. It is consistent with the statements on the bill, which must be taken most strongly against the pleader, that the bills in respect of which a liability is said to be created, may not yet have arrived at maturity; and that the Defendant, therefore, is not in a condition to take any step for the purpose of enforcing his rights in respect of such bills. It was then said, that this was a case of principal and agent, and that, if the principal may file a bill against his agent, the agent may file a bill against his principal; but I cannot admit that the rights of principal and agent are correlative. The right of the principal rests upon the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal. It was lastly said, that the

(a) 3 Mer. 569.

(b) Mos. 318.

(c) 1 Vern. 189.

(d) *Supra*, p. 473.

accounts had been given up by the Plaintiff to the Defendant; but if that case were sufficiently made out, it would give the Plaintiff a right to file a bill of discovery, but would not give him a right to relief.

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PADWICK  
v.  
STANLEY.  
Judgment.

Demurrer allowed, with liberty to amend.

WALKER v. BENTLEY.

March 9th &  
24th.

**EXCEPTIONS** to the Master's report, finding that certain freehold premises, situated in the parish of *Thornton* in *Lonsdale*, were free from great tithes.

The enactment of the Tithe Commutation Amendment Act (9 & 10 Vict. c. 73, s. 19), that every instrument purporting to merge any tithes, and made with the consent of the Tithe Commissioners, shall be absolutely confirmed and made valid, both at law and in equity, in all respects, is not limited to cases in which the person executing the instru-

By indentures of lease and release, dated the 27th and 28th of February, 1818, the premises in question, together with all and singular the tithes of corn, grain, and sheaves, arising, growing, accruing, or renewing upon or from the same, were conveyed to *Robert Burrows* in fee. *Robert Burrows*, by his will, dated the 17th of January, 1825, devised the premises to uses, under which *Alice Walker*, the wife of *George Walker*, acquired the fee, and he devised the tithes to *Edward Burrows*. On the 1st of June, 1838, *George Walker*, by an instrument of that date under

ment has a title to the tithe, but operates as well where such person has no estate in the tithe, as where his estate is insufficient to effect the merger.

The intention of the Tithe Commutation Acts is, that the lands on which the apportionment of the tithe in each parish is cast, and these lands only, shall be liable in respect of the tithe payable for any lands in the parish; and that lands on which no apportionment is cast, shall not be liable to tithe.

Lands, which on the agreement and apportionment under the Tithe Commutation Acts (confirmed by the Tithe Commissioners) are treated as free from tithe, cannot be afterwards made subject to tithe.

The intention of the legislature was to preclude all questions of merger of tithe in all cases where declarations of merger had been made with the consent of the Tithe Commissioners, leaving the parties affected by an erroneous declaration to their remedy against the party making it; and, such being the intention, the merger is effected, although the sanction of the Commissioners has been erroneously given.

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 WALKER  
 v.  
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 ———  
*Statement.*

his hand and seal, stating, that *Alice Walker* was lawfully seised of an estate in possession in fee simple, in the great tithes issuing from the premises, declared it to be his will and intent that the said great tithes should be absolutely merged and extinguished in the freehold and inheritance of the premises, according to the provisions of the Tithe Commutation Act, 6 & 7 Will 4, c. 71. It appeared that this declaration was confirmed by the Tithe Commissioners on the 12th of September, 1839, and that the agreement for the commutation of the tithes of the parish of *Thornton* in *Lonsdale*, which was dated the 11th of September, 1840, contained a clause, which stated that the great tithes of the premises had been declared to be merged by the owner thereof, and that the merger had been duly confirmed by the Tithe Commissioners; and it also appeared that the great tithes of the premises were stated to be merged in the tithe apportionment of the parish, which was confirmed by the Tithe Commissioners on the 30th of September, 1842.

The premises were, in October, 1848, contracted to be sold by the Plaintiff, *Alice Walker*, to the Defendant, free from great tithe. The case of the Plaintiff with regard to the tithe (independently of the statutes) was, that amongst the members of the family of *Robert Burrows* (the father of the Plaintiff, and under whom the Plaintiff derived her title,) it was always considered that the tithe passed by his will along with the land; that no tithe had ever been paid or demanded; and that the Statute of Limitation would be an effectual bar to any claim that might be set up, as there had been no disability in any of the parties entitled to the tithe.

*Argument.*  
 ———

*Mr. Russell* and *Mr. Berkeley* in support of the exceptions.

The declaration of merger made by *Richard Walker*,

the husband of the Plaintiff, was obviously ineffectual, unless it can be contended that such a declaration made by any stranger would be operative. *Alice Walker* had plainly no title to the tithe. Nothing which has been done under the statute by her or by her husband can affect them, and the land must therefore be regarded as still subject to tithe; for the parochial agreement, the apportionment, and the confirmation, all proceeded upon the unfounded assumption that there had been a valid merger. The confirmation by the Commissioners could not have the effect of giving validity to the merger; for, to attribute such an effect to it, would be to treat the Commissioners as having power to decide questions as to the title to tithes, which power they do not possess: *Clarke v. Yonge* (a). But, even supposing a merger to have been formally effected by what has taken place, still the tithe owner would be entitled as against the owner of the land to a payment equivalent to the tithe: *Ware v. Polhill* (b); and to this liability the purchaser ought not to be subjected.

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—  
*Argument.*

Sir *W. P. Wood* and Mr. *C. Hall*, for the Plaintiff, relied on the Tithe Commutation Acts, on the declaration of merger, the subsequent proceedings in the apportionment, and the confirmation of the Commissioners, as concluding any question with respect to the liability of the premises to tithe. They cited *Sugd. V. & P. (Conc. V.)* pp. 267, 227, *Barker v. The Tithe Commissioners* (c), *Edwards v. Bunbury* (d), and *The Queen v. The Tithe Commissioners* (e).

VICE-CHANCELLOR:—

I am of opinion, that the conclusion at which the Master

*Judgment.*

(a) 5 Beav. 523.

M. & W. 320.

(b) 11 Ves. 257.

(d) 3 Q. B. 885.

(c) 9 M. & W. 129; S. C., 11

(e) 15 Q. B. 620.

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has arrived in this case is correct. The first question is, what was the operation of the instrument of merger. Now, the power to merge the tithes was given by the original Act 6 & 7 Will. 4, c. 71 (a), but it was given by that Act only to persons who were seised of the tithes "in possession of an estate in fee simple or fee tail." The power of merging was then greatly extended by the Act 1 & 2 Vict. c. 64; by which it was given to all persons who should be seised of "or have the power of acquiring or disposing of the fee simple in possession of any tithes" (b), and to tenants for life, where the tithes and the lands out of which they were payable were settled to the same uses (c). The power was afterwards further extended by the Act 9 & 10 Vict. c. 73; which enacts, "that all powers relating to the merger and extinguishment of any tithes or rent charge instead thereof, may be executed by a person entitled in equity to such tithes, &c., in all respects, and with the same consequence as he could have done if he had been legally entitled thereunto" (d); and the Act then proceeds as follows: "And every instrument already executed, and purporting to be made in pursuance of the powers of the said Acts, or any of them, by any person so entitled in equity, shall in every respect be as effectual, and have the same consequence, as if he had been legally entitled to the said tithes or rent charge at the time of the execution of such instrument,"—"and every instrument purporting to merge any tithes or rent charge, and made with the consent of the said Commissioners before the passing of this Act, shall be hereby absolutely confirmed and made valid both at law and in equity in all respects (e)."

It is upon the latter words of this section the question under consideration must depend. I can attribute to them no other meaning than that which the words themselves

(a) Sect. 71. (b) Sect. 1. (c) Sect. 3. (d) Sect. 19. (e) Id.

express. It was argued, that they could be meant only to apply to cases in which the persons who had executed the instrument of merger had had title to the tithes; but I can see no sufficient reason for thus limiting their operation. It is clear, that they were meant to apply to cases where the persons who had executed the instruments had not such estates in the tithes as would have made the instruments effectual under the former Acts and provisions, for otherwise they would have been wholly unnecessary; and if they were meant to operate where the estates in the tithes had been insufficient, upon what ground can it be held that they were not meant to operate where there had been no estate at all in the tithes? It is clear, that the legislature must have intended to give effect to the merger in cases which had erroneously received the sanction of the Commissioners; and it is difficult to suppose, that the intention was to do so only in cases where the error was in the extent of the estate, and not in cases where the error was in the non-existence of any estate. The only mode of limiting the construction of the words contained in the latter part of this section which has presented itself to my mind, has been to read the words "every instrument" as meaning "every such instrument." But this construction is open to several objections: First, it interpolates the word "such." Secondly, the language of the two branches of the section is different: the first branch applying to instruments purporting to be made in pursuance of the powers of the Acts; and the second branch applying to all instruments purporting to merge any tithes. And thirdly, the introduction of the word "such" would, I think, confine the operation of the clause to the cases of instruments executed by persons entitled in equity, and would prevent it from operating to remedy defects in other instruments.

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Judgment.

The words  
"every instru-  
ment," in sect.  
19 of the Tithe  
Commutation  
Amendment  
Act, 9 & 10  
Vict. c. 73,  
cannot be read  
as "every such  
instrument."

Upon the whole, therefore, I think that the legislature,

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—  
*Judgment.*

foreseeing the difficulties which might arise from opening questions as to the validity of the declaration of merger, must have intended by the enactment to shut out such questions in all cases where those declarations had been made with the consent of the Commissioners, leaving the parties who might be affected by an erroneous declaration to any remedy which they might have against the parties by whom the erroneous declaration was made. And this brings me to the second view of this case,—the effect of the apportionment.

It was argued on the part of the Defendant, that, as to the tithes of the premises in question, the apportionment had no effect; that the parochial meeting had no power over the question of the titheability or non-titheability of these lands; that the tithes of these lands were not taken into account in fixing the rent-charge; that there was no commutation of these tithes; and that the Act only applies so far as the commutation extends. But these arguments seem to me to present the case in a false point of view, for the question is not, whether these tithes were commuted, but whether the lands are free from tithes; and this depends not upon whether the tithes were commuted under the Act, but what was the operation of the Act, and of the apportionment made under it, having regard to the previous declaration of merger. Now, the scheme of the Act is this—First, the parochial meeting fixes the annual sum payable by way of rent-charge instead of the great and small tithes of the parish collectively, or instead of the great and small tithes severally; and this agreement is to set forth whether any and which of the lands in the parish are or have been, under any and what circumstances, exempt from the payment of any and what tithes (6 & 7 Will. 4, c. 71, ss. 17, 21). Thus, the lands exempt from the payment of tithes are, *ab initio*, distinguished. Then comes the draft of the apportionment, which is to set forth



the parochial agreement, and the several lands to be comprised in the apportionment, and the amount charged on the said several lands; and then the exempt lands are again distinguished in the apportionment: and this apportionment, when confirmed by the Commissioners, is made final and conclusive, first, by the original Act (*a*), and afterwards more completely by the 10 & 11 Vict. c. 104, s. 2. It seems to me, therefore, that the meaning of the Acts was, that the lands upon which the apportionment was cast, and those lands only, should be liable for all the tithes payable in respect of any lands in the parish; and that lands on which no apportionment was cast, should no longer be liable for tithes. That this was intended by the Acts is I think the more evident, from the several provisions contained in them for preventing surprise or injustice in working out their object. Thus, by the 6 & 7 Will. 4, c. 71 (*b*), the Commissioners, before they confirm the parochial agreements, are to cause inquiries to be made, and to require proofs satisfactory to them, whether the agreements have been made without fraud or collusion, and whether they ought to be confirmed; and copies of the draughts of the apportionments are to be deposited in parishes; notices are to be given where the copies may be inspected; and times are to be appointed for hearing objections (*c*); thus affording an opportunity to any party to come in and object. And by the 2 & 3 Vict. c. 62 (*d*), powers are given to the Commissioners to make supplemental awards at any period before the confirmation of the apportionment, where they are of opinion there has been any fraud or error.

Looking at the general scheme of the Acts, and to the particular provisions to which I have referred, I feel no doubt that lands, which in the agreement and apportion-

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 Judgment.

(*a*) 6 & 7 Will. 4, c. 71, s. 66. (*b*) Sect. 27. (*c*) Sect. 61. (*d*) Sect. 8.

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ment were treated as free from tithes, were not intended to be, and cannot afterwards be made, subject to the payment of them; and this opinion is confirmed by the cases which were cited on the part of the Plaintiffs, and is not affected by the case of *Clarke v. Yonge* (a), which merely decides, that, where a rent-charge is fixed, the statute does not prevent Courts of equity from determining what parties are entitled to the benefit of it.

I am of opinion, therefore, that this exception must be overruled, and the excepting party must pay the costs.

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Affirmed by the Lords Justices on appeal.

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(a) 5 Beav. 523.

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Feb. 23rd.  
 March 1st.

### HUGHES v. MORRIS.

On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was, that the purchase-money should be paid to the solicitor of the assignees on or before a certain day, when the purchase was to be completed, and the purchaser to have possession and a bill of sale; the purchaser paid part of the purchase-money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale: — *Held*, that the payment, and the execution of the bill of sale, ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to a decree for specific performance of the contract, by the execution of the bill of sale by the assignees upon payment to them of the balance of the purchase-money.

Under the Bankrupt Act, prescribing the duties of official assignees, the official assignee is bound by contracts entered into by the creditors' assignees for the sale of the bankrupt's property, such contracts not being in breach of their trust.

The provision in a contract for the sale of the property of a bankrupt, entered into by the creditors' assignees, that the purchase-money is to be received by the solicitor of the assignees, is not a breach of trust which would induce the Court to refuse specific performance of the contract.

The solicitor appointed by the creditors' assignees is the solicitor of all the assignees in the bankruptcy, but he is not, by such appointment, otherwise constituted the agent of the official assignee.

These shares were formerly the property of *W. Williams* and *J. Sawtell*, trading under the firm of *Phillips & Co.*, and who became bankrupt in July, 1844. *J. Morris* and *P. Carroll* were chosen the creditors' assignees, and *R. Kynaston* was appointed the official assignee under the fiat. *P. Carroll* was, in June, 1845, discharged from being assignee.

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 {  
 HUGHES  
 v.  
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 —  
*Statement.*

The creditors' assignees appointed *W. T. H. Phelps* to be the solicitor under the fiat; and, on the 18th of May, 1846, he served a notice on the Plaintiff, who was the owner of sixteen other sixty-fourths of the ship, in which *Phelps* described himself as solicitor to *Morris* and *Kynaston*, assignees of the estate, and claimed title for the assignees to the forty sixty-fourths in question. In August, 1846, *Kynaston* ceased to be the official assignee under the fiat, and *A. J. Acraman* was appointed official assignee in his place. In March, 1847, *Phelps* prepared and issued a hand-bill, announcing the sale by auction of the forty sixty-fourths of the ship, to take place on the 8th of April, 1847. This hand-bill stated, that the sale was by order of the assignees, and it referred to *Acraman*, who was described in it as the official assignee, for further particulars. Copies of the hand-bill were sent to *Acraman*. In pursuance of the announcement contained in the hand-bill, the forty sixty-fourths of the ship were put up to sale by public auction, under conditions of sale, in which they were described as belonging to the assignees. The third and sixth conditions were as follows:—"3. That the purchaser shall pay to the auctioneer, immediately after the sale, a deposit, after the rate of 10*l.* per cent. on the amount of his or her purchase-money, and sign an agreement for the payment of the remainder to the solicitor of the vendors, at his offices in Newport aforesaid, on the 30th day of April next, or earlier if the purchaser is prepared, when the purchase is to be completed, and the

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possession of the vessel given up to the purchaser." "6. That, upon payment of the remainder of the purchase-money, together with the dock and other dues, at the time aforesaid, the purchaser shall have a bill of sale of the assignees' interest in the forty sixty-fourth shares, together with ship's stores, sails, and appurtenances enumerated in the schedule, to be prepared by and at the expense of the purchaser; but the vendors shall not be obliged to produce any documentary or other evidence of title whatsoever, other than and except the certificate of registry and the bill of sale from *Elizabeth Phillips of Newport* aforesaid, widow, to the assignees of the bankrupt's estate; and if the purchaser shall require the production of the proceedings under the fiat, the same shall be done by and at his expense."

The Plaintiff, through the medium of a Mr. *Edwards*, became the purchaser of the forty sixty-fourths at the auction, for the sum of 375*l.*; and thereupon *Phelps* and *Edwards* signed the following memorandum:—

"Memorandum of agreement between *W. T. H. Phelps*, the agent of the vendors, and *Henry Edwards*, of &c., That the said *Henry Edwards* hath this day become the purchaser of the shares and premises comprised in the annexed particulars, and subject to the conditions of sale also annexed, at the price or sum of 375*l.*, and hath paid into the hands of Mr. *W. T. H. Phelps*, the vendors' solicitor, the sum of 37*l.* 10*s.* as a deposit of 10*l.* per cent. upon the said purchase-money, and in part payment thereof; and the said *Henry Edwards* agrees to pay the remainder of the said purchase-money at the time and place mentioned in the said conditions; and, upon payment thereof, the said vendors will execute to the said *Henry Edwards* a transfer or bill of sale of the shares according to the said conditions. Dated this 8th day of April, 1847."

The deposit was in fact paid to the auctioneer, and not

to *Phelps*. On the 28th of April, 1847, *Phelps*, as solicitor of the vendors, wrote to the Plaintiff, reminding him that the transaction was to be completed on the 30th of April; and on the 29th of April, the Plaintiff paid to *Phelps* 240*l.* on account of the purchase-money. On the 30th of April, possession of the ship was given up to the Plaintiff by an order from *Phelps* to the dock-keeper. Upon the 10th of May, 1847, the Plaintiff paid *Phelps* a further sum of 50*l.* The residue of the purchase-money was not paid, and the bill of sale was not executed. Upon the 3rd of July, 1847, *Acraman*, the official assignee under the fiat, wrote to *Phelps* to ascertain the name of the purchaser of the shares in the ship, to which *Phelps*, on the 8th of July, replied, that the purchaser was Captain *Hughes*; that he was then at sea; that he had deposited 300*l.*; and that, upon his return, he would complete the purchase. In reply to that letter, *Acraman*, on the 12th of July, wrote to *Phelps*, requesting him to forward the 300*l.*, observing, that he could not consent that it should remain in any other bank than the *Bank of England*. On the 13th of July, *Phelps* answered this letter, and stated, that the money, not having been paid in to the account of the assignees, could not be remitted until the return of the purchaser, when the whole matter would be settled together, and the bill of sale executed. Several subsequent applications were made by *Acraman* to *Phelps* for the payment of the 300*l.*, but no result followed. In October, 1848, *Phelps* was removed from the solicitorship. In this state of circumstances, upon the 13th of September, 1849, the assignees arrested the ship by suit in the Admiralty Court. The Plaintiff then offered to pay the balance of the purchase-money, and made a tender of that balance, which the Defendants refused to accept.

The bill was filed in November, 1849, against the assignees *Morris* and *Acraman*, praying that they might be de-

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—  
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—  
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creed to execute a bill of sale of the forty sixty-fourth shares in question to the Plaintiff, upon the payment by him of the balance of the purchase-money; for an injunction to restrain them from selling the shares; and for compensation in respect of the damage to the Plaintiff by the arrest and detention of the ship. In December, 1849, an injunction was granted by the Vice-Chancellor of *England*, upon the terms of the money being paid into Court.

At the hearing,

*Argument.*  
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The *Solicitor-General* and Mr. *Collins* for the Plaintiff.—The Plaintiff became a purchaser of the shares in the ship, under the condition that he should pay the purchase-money to the solicitor of the assignees; the sale was public; the conditions of sale must be taken to have been framed and issued with the authority of the assignees; and they had full dominion over the property which was about to be sold. In such a case, the purchaser has nothing to do with the question, whether the conditions were prudent or proper: *Borell v. Dann* (a). The purchaser might safely conclude that the assignees were duly performing their duties in appointing their solicitor to receive the purchase-money; and it follows, that he was clearly justified in paying the purchase-money accordingly. There was no other character in which it can be suggested that the purchase-money came to the hands of the solicitor than as the agent of the vendors; and the purchaser could have no remedy against the solicitor to recover it: *Tylee v. Webb* (b). The Defendants, in fact, had clearly admitted the agency of the solicitor, by permitting the Plaintiff to remain in undisputed possession of the ship for upwards of two years, under the contract. If the condition to pay to the solicitor were erroneous, and had occasioned a loss

(a) 2 Hare, 440.

(b) 14 Beav. 14.

to the estate, the assignees might be answerable to the creditors, but that did not make the condition less binding between the vendor and purchaser. The case was, therefore, merely reduced to this,—that the Defendants had sold the shares in the ship, and by their agent received the purchase-money, and yet they took proceedings to recover possession of the shares for which they had been paid. This was conduct which the Court would clearly restrain and prevent, by giving the Plaintiff the legal title upon payment of the balance of the purchase-money, which he had already tendered.

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—  
*Argument.*

Mr. *Rolt* and Mr. *A. Lewis*, for the Defendants, argued,  
—1. That the remedy of the Plaintiff, if any, was entirely at law. 2. That the Court was precluded, by the Ship Registry Act, from enforcing the agreement as against the registered owners, the Act providing that a transfer of property in a ship, except in the manner therein prescribed, “shall not be valid or effectual for any purpose whatever, either in law or in equity (a):” *Davenport v. Whitmore* (b). 3. The assignees had no power to appoint their solicitor to be the receiver of the bankrupt’s estate; that duty was, by the Bankrupt Act, solely confided to the official assignee (c). 4. The assignees did not, in fact, appoint the solicitor to be their agent to receive the money; for it appears that he was appointed solicitor by the creditors’ assignees only, and they, not having power to receive, could not confer that power on another. 5. But if the solicitor, in fact, had the full powers which the conditions of sale express, yet the Plaintiff had not pursued those conditions; for the payment of the purchase-money and the execution of the bill of sale should have been contemporaneous; and the Plaintiff, by paying the money without

(a) See 8 & 9 Vict. c. 89, s. 34.

(b) 2 My. & Cr. 177.

(c) 1 & 2 Will. 4, c. 56, s. 22.

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requiring the bill of sale, had made the solicitor his agent; for, in the receipt of the money in such a manner, he was plainly not the agent of the vendors: *Parnter v. Gaitkell* (a).

The *Solicitor-General* in reply.—The proposition sought to be founded on the Ship Registry Acts is, that no person can enforce a claim to property in a ship adversely to the parties whose title appears on the ship's register. The Plaintiff contends, that there is no such rule of law, and that there may be a valid contract for the sale of a ship which this Court will enforce. The case of *Thompson v. Leake* (b) was decided by Sir Thomas Plumer under the old Navigation Act, 34 Geo. 3, c. 68. So also was *Battersby v. Smyth* (c). The last decision under that Act was *Mortimer v. Fleeming* (d), which occurred in May, 1825, in which it was held, that a contract for the sale of a ship, not entered on the certificate, was void. In July, 1825, the Act, 6 Geo. 4, c. 110, was passed, in which the words of the former statute, rendering any contract or agreement for the sale of a ship, unless by bill of sale, as therein prescribed, invalid and ineffectual (e), were omitted (f). The statutes since that period in like manner omitted the words "contract or agreement" (g). There was nothing, in fact, in the policy of the Navigation Laws which would prevent the Court from enforcing such a contract. The policy was, to prevent the registry of ships as *British* ships which were secretly owned by foreigners; and it was only, therefore, in cases where an alien might seek to enforce a contract for the purchase of a ship, that any question arose on the policy of the Act; and that objection was simply answered by refusing such relief to one who was not a British sub-

(a) 13 East, 432.

(b) 1 Madd. 39.

(c) 3 Madd. 110.

(d) 4 B. & C. 120.

(e) See 34 Geo. 3, c. 68, ss. 14, 15.

(f) See 6 Geo. 4, c. 110, s. 31.

(g) See 8 & 9 Vict. c. 89, s. 34.



ject. The execution of the ordinary duties of assignees in bankruptcy, in fact, shewed that there could be no such objection; unless it could be contended, that, in every case where the assignees of a shipowner sold by auction according to their duty the shares of the bankrupt in ships, there was still no binding contract with the purchaser, and that it depended entirely on the honesty of the parties whether it should be performed: it was not reasonable to suppose that this was the state of the law.—He cited also *Whitfield v. Parfitt (a)*.

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 }  
 HUGHES  
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 —  
*Argument.*

VICE-CHANCELLOR (after stating the facts):—

It was argued for the Plaintiff that *Phelps* was constituted the agent for *Acraman* as well as for *Morris*, who was the sole creditors' assignee under the commission. This argument was rested upon the notice given by *Phelps* in May, 1846, in which he describes himself as solicitor for the official assignee and for the creditors' assignees—upon the hand-bill which *Phelps* issued, and in which he stated the sale to be by order of the assignees,—and upon the conditions of sale. Looking at these documents, I cannot go the length of saying that by them *Acraman* expressly constituted *Phelps* to be his solicitor or his agent. It seems to me, as to the notice, that although *Phelps* was appointed by the creditors' assignee only, he might well describe himself as solicitor for the assignees; and, therefore, I cannot, from the fact of his having so described himself, infer that *Acraman* had given him an authority. By the provisions of the Bankrupt Act, the official assignee is not to interfere with the assignees chosen by the creditors in the appointment or removal of the solicitor (b). If, there-

*Judgment.*  
 —

(a) Before Vice-Chancellor *Knight Bruce*, Feb. 18th, 1851.

(b) 1 & 2 Will. 4, c. 56, s. 23.

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fore, the solicitor be appointed by the creditors' assignees, he may well be considered as not appointed merely for the creditors' assignees, but also for the official assignee; and I cannot, from the mere fact of his being described as solicitor for both, infer that the official assignee has constituted him his agent; nor is it possible to draw that inference from the expression in the hand-bill "by order of the assignees," which was communicated to *Acraman*,—or from the reference to *Acraman*. These circumstances are too loose and general to afford ground for such a conclusion. It is true, that the creditors' assignees are to have the management of sales (a), and there is but one creditors' assignee; but it seems going much too far to fix the official assignee with the agency of the solicitor appointed by the creditors' assignees, through the simple fact of a hand-bill having been issued by the solicitor and communicated to the official assignee, in which the solicitor has stated the sale to be "by order of the assignees." As to the conditions of sale, the same observations apply; and, in addition, I cannot find upon the evidence that the conditions of sale were ever communicated to the official assignee.

Independently of any express authority given by *Acraman* to *Phelps*, the operation of the Bankrupt Act is to be considered. The statute enacts, that "all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of the sale of all the estate and effects, real and personal, of the bankrupt, shall, in every case, be possessed and received by such official assignee alone, save where it shall be otherwise directed by the Court of Bankruptcy, or any Judge or Commissioner thereof" (b); and that nothing therein contained "shall authorise any such official assignee to interfere with the assignees chosen by

(a) 1 &amp; 2 Will. 4, c. 56, s. 23.

(b) *Id.* s. 22.

the creditors in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estate or effects" (a). I think the meaning of this enactment must be, that, though the official assignee is to receive the money, contracts for the sale of the property may be entered into by the creditors' assignees; and I think the result of that necessarily is, that the official assignee must be bound by contracts which are entered into by the creditors' assignees; for otherwise the effect would be, that when the creditors' assignees entered into a contract for the sale of an estate, their contract would not be binding; and, because the official assignee does not enter into the contract, no bill for specific performance would lie against the official assignee. I think, therefore, that under that enactment a contract entered into by the creditors' assignees must be binding on the official assignee. Whether the official assignee is bound by a contract clearly founded upon a breach of trust, would be open to great question; but I think the mere fact of the creditors' assignees providing, by the conditions of sale, that the money is to be paid to the solicitor, would not be such a breach of trust as would induce the Court to say that the contract was not to be performed.

If then the contract be binding upon the official assignee according to the conditions of sale, we must see what are the conditions of sale. [His Honour read the conditions 3 and 6, *supra* pp. 637, 638.]

According to these conditions, the payment of the balance of the purchase-money, and the execution of the bill of sale, are to be contemporaneous acts. But what has the purchaser done? He has paid to the solicitor money on account, without obtaining any bill of sale. Upon the

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(a) 1 & 2 Will. 4, c. 56, s. 23.

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*Judgment.*

29th of April, 1847, the day before the time fixed for the completion of the contract, he paid *Phelps* 240*l.* On the 10th of May, 1847, without any bill of sale, he again paid a further sum of 50*l.* on account of the purchase-money. It being a contract to be completed by the payment of the purchase-money and the acceptance of the bill of sale, I think the purchaser was not authorised to make payments to the solicitor on account without receiving the bill of sale. Had the purchaser completed the contract according to the conditions of sale, the official assignee would not have executed the bill of sale without having received the money. The effect of this payment was to deprive the official assignee of that check, which he would have had if he had been required to execute the bill of sale. Undoubtedly, none of these questions would have arisen had the purchaser acted strictly according to the conditions, by requiring the bill of sale to be executed when he paid the balance of the purchase-money. Upon these grounds, I am of opinion that there has been a deviation from the conditions upon the part of the purchaser, which has caused the mischief that has arisen; and I cannot therefore decree a specific performance at the suit of the purchaser, upon the terms of the payment of the balance of the purchase-money.

It has been suggested, in the course of the argument, that the official assignee has recognised the receipt by *Phelps*; but I do not think he has done so, otherwise than by requiring that the money which *Phelps* had received should be paid over to him; and I do not think this can give the purchaser a better right, when the money has not been paid over. The bill must be dismissed, but certainly without costs.

A very important question was raised upon the case as to the validity of the contract, with reference to the Ship Registry Acts; but I think it would be improper in me to

give any opinion upon it, as I find in *Davenport v. Whitmore* (a), where the Defendant's claim was founded upon an alleged equitable title in a ship by contract, Lord *Langdale* allowed the demurrer to the bill; and, upon appeal, Lord *Cottenham*, though he overruled Lord *Langdale's* decision upon another point, declined to give any decision upon this question; and I think it is too important to be decided without a full argument.

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 Judgment.

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Decree affirmed by the Lords Justices on Appeal, 1st of June, 1852.

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(a) 2 My. & Cr. 177.

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#### ATTORNEY-GENERAL v. HULL.

Feb. 24th.

AN information, at the relation of *W. Hodge*, founded on the following bequest in the will of *Robert Warner*, dated in 1831, of which the Defendant *John Warner* was the residuary devisee and legatee:—

“I give and bequeath to the said *John Hull* the sum of 400*l.*, to be by him paid and applied towards the establishing a school near the Angel Inn at *Edmonton*, on the system of the above-mentioned *British and Foreign School Society*, provided a further sum can be raised in aid thereof, if found necessary.”

In 1834, the executors paid the 400*l.* to *John Hull*, who invested it in Consols; and the information prayed that the fund and its accumulations might be applied for the charitable purpose directed by the will, or as nearly thereto as might be, according to the intentions of the testator. The answer stated, that the fund itself was not sufficient to establish the school, and that many ineffectual efforts had

A bequest of a legacy, to be applied towards establishing a school at *A.*, provided a further sum could be raised in aid thereof, if necessary:—  
*Held*, to import an intended outlay of the sum in building a school-house at the place referred to; and, therefore, to be a void bequest within the Statute of Mortmain.

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 —

been made to obtain, by subscription or otherwise, a fund in aid of the legacy. Evidence was given, that the legacy was inadequate for the purpose, and that such attempts had been made to increase it, and had failed.

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*Argument.*  
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Mr. *Koe* and Mr. *Welford*, in support of the information, cited *Kirkbank v. Hudson* (a), and the *Attorney-General v. Williams* (b), and contended, that the establishment of the school did not involve the necessity of vesting land in mortmain. The school might be effectually established and conducted in hired rooms in the situation referred to, and there was no evidence that any difficulty would be found in hiring such rooms.

Mr. *J. Chapman* for the trustees.

Mr. *Rolt* and Mr. *S. Thompson*, for the Defendant *John Warner*, argued, first, that the bequest was void, as contrary to the Statute of Mortmain: *Mather v. Scott* (c), *Attorney-General v. Hodgson* (d), *Giblett v. Hobson* (e). Secondly, that, if not originally void, the gift had become void, having been made upon a condition which had not been performed, viz. the providing of such further sum as was necessary for the purpose stated.

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*Judgment.*  
 —

The VICE-CHANCELLOR said, he was of opinion, that, upon the true construction of the will, the school was to be established by a school-house being built. Many senses might, no doubt, be given to the word "establishing." It might mean, by directing a payment to be made to a schoolmaster for giving instruction; and if this meaning could properly be ascribed to the testator, then within the distinction

(a) 7 Price, 212.

(d) 15 Sim. 146.

(b) 2 Cox, 387.

(e) 3 My. & K. 517.

(c) 2 Keen, 172.

taken in the *Attorney-General v. Williams* the bequest might be good. The first part of the language of the will, the direction to apply the legacy towards the establishing a school near the *Angel Inn, Edmonton*, pointed to a particular locality, and rather indicated an intention to occupy a site in the neighbourhood referred to; but upon these words alone there might perhaps be a doubt, whether they would not admit of another meaning being attributed to the word "establish." The latter part of the bequest, however, removed all doubt, "provided a further sum can be raised in aid thereof, if found necessary." It was clear that the testator contemplated the establishment of the school, not by a succession of small payments, but by an immediate expenditure of a sum of money, which might be greater than the amount of the legacy. He thought it clear that the intention was, that land should be purchased, and a building erected for the purpose of the proposed school. The gift was, therefore, void, and the information must be dismissed.

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Judgment.

IN THE MATTER OF ROUSE'S ESTATE.

Feb. 27th &  
28th.

**W. ROUSE**, by his will, dated in 1842, bequeathed 2000*l.* to trustees, upon trust to invest, and pay the in-

A bequest of a legacy, upon trust to apply so much of

the interest as the trustees should think proper in the maintenance of the testator's grandson until twenty-one; and, upon his attaining that age, to pay the whole of the interest of the legacy to the grandson, for his life; and a direction that, after the decease of the grandson, the trustees were to stand possessed of the legacy and interest, and all accumulations, in trust for the grandson's children, with remainder, in default of such issue, over:—*Held*, that the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, shewed that the interest was intended for him; that the legacy vested in interest (although not in enjoyment,) before the grandson attained twenty-one; and that the grandson was therefore entitled to the interest which accrued during his minority, and was not applied in his maintenance.

That the unapplied accumulations accruing during the minority of the grandson did not go with the capital of the legacy, because the disposition of the capital after the grandson attained twenty-one was of the interest and certain specific accumulations, not including the accumulations during the minority.

A legacy to a child carries interest, on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of the child out of another fund, the legacy does not necessarily carry interest.

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Statement.

terest, dividends, or annual produce, or so much thereof as they should think proper, in or towards the maintenance, education, and preferment in the world of his grandson *John Rouse*, until he should attain twenty-one, and when and as soon as he should attain that age, upon trust to pay the whole of the said interest, dividends, and annual produce, unto his said grandson, or permit or empower him to receive the same during his life, for his own benefit, with a limitation for the benefit of the wife, child, or children of the grandson, in case of his alienation or insolvency; and in default of any object of such trust at any period during the life of his grandson, then such interest &c. were to be accumulated, and invested in augmentation of the said sum of 2000*l.*, in the nature of compound interest; and after the decease of his grandson, upon trust to stand possessed of the said sum of 2000*l.*, and the annual produce and all accumulations of the same, in trust for the children of his grandson, who should attain twenty-one or die under that age leaving issue; and if there should be no such child or representative of a deceased child of his grandson, then, after his decease and such failure of his issue, the testator bequeathed the said sum of 2000*l.*, and the annual produce and all accumulations of the same, if any, unto and equally amongst the testator's three sons, *William*, *David*, and *Francis*, as tenants in common. And the testator empowered his trustees, after the decease of his grandson, and while any of his grandson's children should be under twenty-one, and also until the vesting of the portion or respective portions provided for their respective issue by the trusts thereinbefore contained, to apply the annual produce to which the children or child of his grandson should be entitled, and also the annual produce of the portion or portions to which their, his, or her issue would be entitled in expectancy, or so much thereof as should in the judgment of his trustees be necessary, for or towards their, his, or her respective maintenance or education; and



directed that they should from time to time invest the residue of the said annual produce, and stand possessed of the annual produce and the accumulations, upon the trusts thereinbefore declared of the funds from which such accumulations and annual produce should have proceeded, or as near thereto as circumstances would permit. And the testator gave the residue of his estate to his said three sons.

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*John Rouse* the grandson, attained twenty-one in January, 1851. No part of the income of the 2000*l.* which accrued during his minority was required or applied for his benefit. These accumulations of income, amounting to about 800*l.* in Consols and cash, were transferred and paid into Court. The annual income of the legacy and the accumulations were made the subject of a settlement on the marriage of *John Rouse*; and he and his wife, and their trustees, presented their petition for the transfer and payment of the accumulated fund to them, upon the trusts of the marriage settlement.

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Mr. *Baily* and Mr. *Amphlett* for the petitioners.

Argument.

Mr. *Baggallay* and Mr. *Turner*, for the executors and residuary legatees of the testator, and the trustees of the fund in question.—*Wynch v. Wynch* (a) and *Rudge v. Winnall* (b) were cited.

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VICE-CHANCELLOR:—

In this case, the petitioner *John Rouse* was an infant when the testator died. No part of the interest of the legacy of 2000*l.* was applied for his maintenance; and the ques-

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(a) 1 Cox, 433.

(b) 12 Beav. 357.

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tion is, to whom the unapplied interest belongs,—whether *John Rouse* was entitled to it. The petitioners *Hammond* and *Firth*, who are trustees of a settlement made of it by *John Rouse*, contend that he was. On the other hand, it is contended, that it either goes with the capital of the legacy through all the dispositions of the will, or that it belongs to the residuary legatees.

My opinion is, that the unapplied interest does not go with the capital of the legacy. All the dispositions of the will after *John Rouse* attains twenty-one are of the interest of the 2000*l.* only, except as to the accumulations, which, in certain specified events, might arise after that period; and the specification of these accumulations shews that the accumulations arising before that period were not contemplated by the testator as being subject to the ulterior trust. The question, therefore, lies wholly between the petitioners and residuary legatees; and I think the petitioners are entitled to these accumulations.

The question, as I view it, is, when the title of *John Rouse* commenced in interest. In enjoyment it could not commence until he attained twenty-one; but in interest it might, and I think did, commence before that time. The case of *Wynch v. Wynch* (a) is, I think, a strong authority upon the point. There, the gift was of 10,000*l.*, to be paid to the testator's daughters at twenty-one or marriage, and he directed his trustees to pay such sums of money out of his personal estate for the maintenance and education of the daughters until their portions should become payable, as the trustees should think fit, not exceeding the interest of their respective portions at 4*l.* per cent. The Master of the Rolls said, that the father had directed the maintenance to be paid out of his personal estate; if it had been

(a) 1 Cox, 433.

payable out of the interest of the legacies, he should have thought the daughters entitled to the interest of their portions. The reasons for this opinion are not stated; but, in considering the case, I think they will sufficiently appear.

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 Judgment.

A legacy to a child carries interest on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of the child out of another fund, the legacy does not carry interest. The question of interest, therefore, depends upon whether maintenance is provided; but if maintenance is given out of the interest of the legacy, why is the legacy to carry interest beyond the maintenance? It cannot, it should seem, be because of the duty to provide maintenance, for that duty is discharged; and I can see no reason for it but this, that the gift of the maintenance out of the interest shews that the interest is intended for the legatee. I think, therefore, that in this case *John Rouse* took the legacy in interest before he attained twenty-one, although he could not take it in enjoyment until twenty-one.

The case of *Rudge v. Winnall* (a) was cited in opposition to *Wynch v. Wynch*. But whatever may have been the trusts in that case, it sufficiently appears there was no trust to pay the maintenance out of the interest of the 6000*l.*, which distinguishes the cases; and certainly it could not have been intended by that decision to overrule *Wynch v. Wynch*, for the Master of the Rolls would then assuredly have so intimated.

The conclusion at which I have arrived in this case is, I think, much fortified by another class of cases.

(a) 12 Beav. 357.

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The question, whether a legatee is entitled to interest, is frequently of great importance in determining whether a legacy is vested or not; and it is material, therefore, to consider what are the decisions on that point. In *Love v. L'Estrange* (a), the legacy, which consisted of the residuary estate, was given to trustees, in trust, the testator says, "to sell, dispose, and improve the same to the best advantage, as in the judgment and discretion of them and the survivor of them, and the executors and administrators of such survivor, whereunto, for gain or loss, the same is hereby wholly deferred, until *Walter Nash* shall attain his age of twenty-four years, it being my desire that he shall be employed wholly in his trade, either as an apprentice, according to his present indentures, or as a journeyman, until his said age, upon trust in my said loving friends reposed, and from the age of twenty-one years of the said *Walter Nash*, out of the said residue, to pay him an annuity of 10*l.* yearly, until his age of twenty-four years, and from thenceforth in trust for him the said *Walter Nash*, his executors, administrators, and assigns; and the accounts of the said residue to be given by my said trustees to be binding and conclusive to him, without exception or any question at all to be made by him or them therefore." The reasons for the decisions of the Lord Chancellor and the House of Lords do not appear; but what Sir *W. Grant* says of the case in *Hanson v. Graham* (b) is most material. He says, "*Love v. L'Estrange* seems to have been considered a strong authority for holding 'when' to operate conditionally. The late Lord Chancellor was so strongly impressed with the idea he had thrown out at an early period in *Monkhouse v. Holme* (c), that he found it difficult to account for it otherwise than upon the distinction as to a residue, which the late Master of the Rolls in *Booth v. Booth* (d) acknowledged there might be. But it was not

(a) 5 Bro. P. C., Toml. edit., 59.

(b) 6 Ves. 239.

(c) 1 Bro. C. C. 298, 300.

(d) 4 Ves. 399, 405.

necessary to resort to that, for *Love v. L'Estrange* may be warranted upon the principle laid down in *Goodtitle v. Whitby* (a). It was not a simple unqualified gift, but there were many circumstances to shew that *Walter Nash* was meant to have the benefit absolutely, and that the enjoyment only was postponed, the testator giving it to trustees in the meantime, and assigning a reason for withholding the enjoyment from this minor, that he wished him to follow his trade as a journeyman, with which object he naturally thought that fortune would interfere, and therefore he postpones the enjoyment of it until the age of twenty-four. But he gives it to trustees entirely and absolutely for the benefit of *Walter Nash*, to improve it for his benefit, to transfer the whole to him when he arrives at that age, and to make him a certain allowance in the meantime. That is very different from a simple bequest to him when twenty-four; for if that had been a legacy, it would have been separated from the residue immediately upon the testator's death, and must have been paid over to trustees immediately, and they would have managed it until the legatee had attained the age of twenty-four." And besides these cases, there are the decisions in *Bland v. Williams* (b), *Davies v. Fisher* (c), and *Saunders v. Vautier* (d), all of which bear more or less upon the subject, and all of which are in favour of the legatee. The last of those cases seems to me to be particularly so, as it goes upon the ground of the legacy being separated from the residue.

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Tax and pay the costs of all parties out of the fund, and transfer and pay the residue to *William Rouse* and the trustees of the settlement.

Minute.

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(a) 1 Burr. 228, 234.

(c) 5 Beav. 201.

(b) 3 My. & K. 411.

(d) Cr. & Ph. 240.

1852.

March 4th.

## SCALES v. COLLINS.

The rule,—where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both,—that the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate to those who have no other fund, applies equally to the case where one of the legacies only is charged upon real estate.

The Court does not construe a charge upon real estate of one only of several legacies if the personal estate should not be sufficient, as intended for the exclusive benefit of that legatee, but construes the intention of the testator to be, that all his legacies shall be paid; and therefore that the charge is to take effect if the personal estate be insufficient for the payment of all the legacies.

A SPECIAL case, in which *E. Scales* and *Cecilia*, his wife, and *J. C. Browne*, on behalf of themselves and all other the general legatees under the will of *Edward Collins* were Plaintiffs, and his executors and the devisees of his real estate Defendants.

*Edward Collins*, by his will, dated in April, 1841, among other legacies, gave the Plaintiff *Cecilia* 1000*l.* Consols, and devised his real estate unto the Defendant *Edward Collins* and two others, to the use of the Defendant *C. Collins* for life, with remainder to his first and other sons successively in tail, with remainder to *G. Collins* for life, with remainder to his first and other sons successively in tail, with remainder to the Defendant *J. Collins* for life, with remainder to his first and other sons successively in tail, with remainders over. And the testator bequeathed to his trustees a sum of 15,000*l.* Consols (which he described in his will as part of a larger sum of that stock belonging to him) upon trust, to be laid out in the purchase of freehold estates, to be held by them upon the same trusts as were by the will declared of the devised estates. The testator also bequeathed a certain sum of 5250*l.* Three-and-a-Half per Cent. Stock, and a certain sum of 1500*l.* Consols, over which respectively he had a power of appointment, to the said trustees, upon the same trusts as were declared of the 15,000*l.* Consols. By a codicil, dated in November, 1847, the testator gave to *Lucy Prym*, his niece, 15,500*l.*, and to *J. C. Browne* 1000*l.*, to be paid out of his personal estate within three months after his decease. By a second codicil, dated in February, 1848, the testator gave a further sum of 4500*l.* to *Lucy Prym*, in addition to the 15,500*l.*, making 20,000*l.*, which he directed his trustees and executors to pay to her within three

months after his decease out of his personal estate and effects, if sufficient for that purpose; otherwise he directed and empowered them to sell a sufficient portion of his real estate as might be necessary to make up the said sum of 20,000*l.*, and pay the same at the time aforesaid. By a third codicil, dated in March, 1848, the testator devised to C. E. Collins and his heirs, certain estates which he had then recently purchased.

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 v.  
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 Statement.

The general legacies (including the 20,000*l.* to *Lucy Prym*) amounted to 22,691*l.* 10*s.* cash and 6000*l.* Consols; and these sums, the balance of the personal estate not specifically bequeathed, (after payment of the debts and funeral and testamentary expenses of the testator), was not sufficient to pay.

The question which in this state of circumstances was presented to the Court by the special case was, whether all the general legacies ought to abate rateably; or whether the general legatees, other than *Lucy Prym*, were entitled to have the testator's estate marshalled, so that the real estate might be applied to make up the deficiency created by the payment of *Lucy Prym's* legacy in full out of the personal estate.

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Sir *W. P. Wood* and Mr. *Eade*, for the Plaintiffs, the general legatees, contended:—1. That the assets should be marshalled, and the legacy to *Lucy Prym* raised and paid, so far as was necessary to leave sufficient personal estate for the Plaintiffs, out of the real estate: *Olifton v. Burt* (a), *Masters v. Masters* (b), *Bligh v. Earl of Darnley* (c), *Hanby v. Roberts* (d), *Norman v. Morrell* (e),

Argument.

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- (a) 1 P. Wms. 679.  
 (b) Id. 421.  
 (c) 2 Id. 619.

- (d) Amb. 127.  
 (e) 4 Ves. 769.

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Argument.

*Aldrich v. Cooper* (a), *Bonner v. Bonner* (b); and, if abatement were necessary, that the direction to pay the legacy to *Lucy Prym* within three months did not give her any priority which would relieve her from the necessity of abating with the other legatees: *Beeston v. Booth* (c).

Mr. *Russell*, Mr. *Nichols*, and Mr. *J. Barber*, for the Defendants, contended that the charge of *Lucy Prym's* legacy on the real estate was a peculiar and personal benefit for her alone, and in which it was not the desire of the testator that the other legatees should participate. That, to give all the legatees the benefit of the charge on the real estate in such a case would be evidently going beyond the intention of the testator, and would be, without reason, depriving the devisees of the real estate, which the testator intended they should take.

Judgment.

VICE-CHANCELLOR:—

I entertain no doubt in this case. The general rule of law is perfectly admitted. It is however said, that there is a distinction between the case of a class of legacies, and the case of individual legacies; but I confess I have not heard any argument or reason for drawing such a distinction. If there be a charge of a general class of legacies on real estate, it is perfectly clear that the rule applies in favour of the other legacies given out of the personal estate. Why the same rule should not apply to the case of an individual legacy, I am at a loss to conceive. It is said, the intention here is the personal benefit of Miss *Prym*. But observe what is the language of the testator. He directs the trustees to pay Miss *Prym* within three months next after his decease out of his personal estate and effects,

(a) 8 Ves. 381.

(b) 13 Ves. 379.

(c) 4 Mad. 161.



if sufficient for that purpose, otherwise he directs them to sell a sufficient portion of his real estate. Now what is the meaning of the words "if sufficient for that purpose?" Here the personal estate is not sufficient for the purpose, unless it is sufficient for the payment of all the legacies; and if it be not sufficient for the payment of the legacies, then the testator intended to charge the real estate in favour of Miss *Prym*. It is therefore nothing more than the common case of a charge upon the real estate of the particular legacy, with a general charge of that legacy with all the other legacies upon the personal estate. The principle of the Court is this: that, where one legatee has two funds to resort to for the payment of his legacy in full, and another legatee has only the personal estate or one fund to resort to, the Court presumes that the intention of the testator is, that all should be paid in full, and therefore marshals the assets, throwing the particular legacy upon the real estate. I am clearly of opinion, therefore, that under this will the general legatees are entitled to have the assets marshalled, so as to enable them to resort to the real estate in order to make up the deficiency of the personal estate.

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It was suggested by the counsel in the cause, that there should be an apportionment of the balance of the legacies to be raised out of the real estate, between the real estate devised by the will and the real estate devised by the third codicil.

The VICE-CHANCELLOR said, that the question as between the different devisees of the real estate was not raised by the case.

The Plaintiffs' counsel said, that they had not raised the question, because the real estate devised by the will was sufficient for the purpose of the legatees. The coun-

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 Judgment.

sel for all parties, however, suggested that, inasmuch as it was stated upon the case that the devises were different,—one in tail and the other in fee, the Court might dispose of the incidental question between them.

The VICE-CHANCELLOR expressed his opinion to be, that the charge extended only to the real estates which belonged to the testator at the date of the codicil of the 17th of February, 1848, and not to the estates which were afterwards purchased, and which were devised by the codicil of March, 1848.

Minute.  
 —

DECLARE that the costs ought, in the first instance, to be paid out of the personal estate, and that the general personal estate ought to be applied in paying the general legacies other than the legacy to *Lucy Prym*; and that the surplus of the general personal estate (so far as it was necessary) ought to be paid to *Lucy Prym*, and the deficiency (if any) raised by sale or mortgage of the real estate.

Feb. 28th.  
 March 3rd,  
 4th, & 9th.

Bill for the specific performance of an agreement made between patentees for the use of their respective patents, embodied in an order at *Nisi Prius*, the Defendants admitting that they were bound by the agreement, and that it ought to be specifically performed, but disputing its meaning—dismissed without costs, on the ground that the agreement was framed in terms which were incapable of any certain construction.

### TATHAM v. PLATT.

THE Plaintiffs were patentees of improvements in machinery or apparatus for preparing and spinning cotton wool and other fibrous substances; their patent was dated the 14th of May, 1844. The Defendants were also patentees of improvements in machinery or apparatus for a similar purpose; and their patent bore date the 15th of June, 1847. In 1849 the Defendants in equity, the second patentees, brought an action against the Plaintiffs in equity, the first patentees, for an infringement of the second patent; and upon the trial of this action at the Spring Assizes for the southern division of the county of *Lancaster*,

at *Liverpool*, in April, 1849, the following agreement was entered into, and was embodied in a rule of Court as follows:—

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*Statement.*

“By consent of the parties, their counsel, and attornies, it is ordered by the Court, that the last juror empannelled and sworn in this cause be withdrawn from the panel, and that the rest of the jurors be discharged from giving any verdict in this cause; and by and with such consent as aforesaid, and by and with the consent of Messrs. *John Platt, James Platt, J. T. Hibbert, and J. Radcliffe*, carrying on business as machine-makers at *Oldham* under the firm of *Hibbert & Platt*, who have consented to be and are hereby made parties to this rule—It is ordered by the Court that the Defendants shall give a license, under their patent, to the said *John Platt, James Platt, J. T. Hibbert, and J. Radcliffe*, at 29*l.* per cent. less than to any other licensee. That the bill in Chancery, filed by the Defendants in this cause against the said *John Platt and James Platt*, shall be dismissed on the application of the Defendants in this cause. That each of the parties to this rule shall pay his and their own costs, both at law and in equity. That, for the remaining three years of the Plaintiffs’ patent beyond that of the said Defendants’, the profits of licenses under the Plaintiffs’ patent shall be equally divided between the Defendants and the said *John Platt, James Platt, J. T. Hibbert, and J. Radcliffe*, that is to say, that the Defendants shall have and take one moiety of the said profits, and the said *John Platt, James Platt, J. T. Hibbert, and J. Radcliffe* shall have and take the other moiety of the said profits. That the said *John Platt, James Platt, J. T. Hibbert, and J. Radcliffe* shall give an account of the machines already made, and shall pay for the altered machines according to the above arrangement. That no discount shall be allowed on the machines made according to the original

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 —  
*Statement.*

plan of the Defendants; and that the Defendants' licensees shall in future make machines according to the altered plan; and that the Defendants shall have the control over the amount of patent right; the said *John Platt, James Platt, J. T. Hibbert, and J. Radcliffe* having the aforesaid deduction of 29 $\frac{1}{2}$  per centum. And that this rule be made a rule of the Court of Exchequer of Pleas, if that Court shall so please."

The Plaintiffs in equity caused drafts of a license and agreement to be prepared, for the purpose of carrying out the terms of the order at *Nisi Prius*, according to their views of its meaning; but the Defendants in equity insisted that such drafts were not in conformity with the order. The bill was filed in April, 1850, for specific performance of the agreement contained in the order; and that proper instruments might be settled by the Master for that purpose; and that an account might be taken of the patent machines manufactured by the Defendants, and payment made to the Plaintiffs in respect thereof, on the footing of the agreement.

The Defendants by their answer admitted that they had consented to the rule of *Nisi Prius*, and by such consent did become and were bound specifically to perform and carry into execution the contents thereof; and they said they were ready to perform the agreement according to their construction of the same.

*Argument.*  
 —

*Mr. Rolt, Mr. W. M. James, and Mr. Webster*, for the Plaintiffs, submitted, that the Court would refer it to the Master to settle the proper instruments for giving effect to the agreement, and would accompany that reference with such a declaration of the construction of the agreement, as would enable the Master to determine the form of the in-

strument, and take the account. The Court would determine, first, whether the licenses granted before the agreement was made were to be conclusive for all future time, with regard to the price or charge for such license; and whether the 29½ per cent. was to be deducted from the charge for such antecedent licenses; or whether the 29½ per cent. was to be taken with reference to future licenses; and whether it applied to licenses in gross, or licenses at so much per machine; or, if it applied to licenses in gross, whether it was not confined to licenses in gross to make and vend the machines, as distinguished from licenses for their use. There was nothing inconsistent or unreasonable in such a restriction of the meaning of the agreement; and, on the contrary, so to restrict it, would carry into effect the intentions of the parties.

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—  
*Argument.*

Mr. *Russell* and Mr. *Giffard*, for the Defendants, contended that the agreement was incapable of a sensible and consistent construction; and that it could not have been understood by the parties at the time they entered into it.

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VICE-CHANCELLOR:—

This case stood for judgment in order that I might more fully consider whether the agreement, for the specific performance of which the bill is filed, was sufficiently certain to warrant the Court in decreeing it to be specifically performed.

*Judgment.*  
—

Having given the best attention in my power to the terms of this agreement, I confess myself unable to discover what the parties really intended by it. The first term is, that the original patentees shall give a license under their patent to the second patentees, at 29½ per cent. less than to any other licensee. Now licenses may be granted by patentees for all or any part of the term, for

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—  
*Judgment.*

the whole range of the patent or for certain districts, for an indefinite number of machines or for a limited number; and they may be granted in consideration of a sum in gross, of a certain sum per annum, of a fixed sum for each machine, or of varying sums according to the number of machines manufactured or used; and I can find nothing in this agreement which leads to any certain conclusion to what description of licenses the parties intended to refer, as the licenses to which the deduction of 29% per cent. was to be applied. I see no means by which the sums paid for the different descriptions of licenses to which I have referred could be thrown into an aggregate amount from which the deduction of 29% per cent. could be made; and I am therefore led to believe, that the parties must have contemplated some particular description of licenses. I think it probable that they contemplated licenses co-equal with the patent in duration and extent. This, however, is not expressed in the agreement; and to put this construction upon it would evidently defeat the purpose for which it was entered into, for the plain meaning of the deduction of 29% per cent. is to place the second patentees in a position superior to that of the other licensees under the original patent; and the consequence of holding the construction I have mentioned would be, that the original patentees might grant a few licenses co-equal with the patent in duration and extent, and thus fix the amount from which the 29% per cent. was to be deducted; and might then grant other licenses limited in duration or extent at reduced rates, and thus enable those other licensees to undersell the second patentees.

It was argued, that the agreement must be understood to mean, that the second patentees were to have licenses at 29% per cent. less than other licensees for the same purposes for which the other licenses were granted, and I had hoped that this construction might be put upon the agreement;

but, upon considering it, I think that, however well this construction might apply as between a license to manufacture and use granted for a sum in gross, and a license to manufacture and sell granted upon a royalty for each machine,—it could not be applied to all the descriptions of licenses to which I have adverted. It may, perhaps, have been the intention of the parties that the original patentees should be limited in the description of licenses which they should grant,—but this, I think, is not to be collected from the agreement; and the clause giving them the control of the patent right is unfavourable to that construction.

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 —  
*Judgment.*

The case is further complicated by the provision, that the second patentees “shall pay for the altered machines according to the above arrangements;”—for this clause, I think, imports that the parties looked to the past as well as the future,—at all events as to machines already made.

Looking at the whole, I find myself unable to arrive at any other conclusion than that the parties did not themselves understand the agreement into which they entered; and that it is couched in such terms that no certain construction can be put upon it; and I am of opinion, therefore, that this bill must be dismissed, but it must be dismissed without costs.

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March 10th  
& 11th.

Bequest of all the testator's Great Western Railway shares, and all other the railway shares of which he might be possessed at the time of his decease,—held to pass Great Western Railway shares which he had at the date of his will, and which were afterwards, by a resolution of the Company made under the authority of an Act of Parliament, converted into Consolidated Stock; but held not to pass Consolidated Stock in the same Company purchased by the testator after the date of his will.

### OAKES v. OAKES.

THE testator, by his will, dated the 26th of April, 1849, bequeathed as follows:—"I give and bequeath all my Great Western Railway shares, and all other the railway shares which I shall be possessed of at the time of my decease, unto my nephew *Arthur Oakes*, for his own absolute use and benefit."

The testator, at the date of his will, was the registered proprietor of 40 shares of 100*l.* each, 40 of 25*l.* each, 100 of 20*l.* each, and 120 of 17*l.* each, in the Great Western Railway Company.

By an Act (a) obtained by the Great Western Railway Company in 1844, the Company were empowered, by and with the consent of a majority of the votes of the proprietors at some general or special general meeting, to raise so much of the additional capital therein mentioned as might not have been raised by shares before the passing of that Act, by the creation of new shares of such nominal value and to be issued at such times as the directors might think fit, or by the creation of stock in manner thereafter mentioned. And it was also provided (sect. 18) That it should be lawful for the Company, with consent of three-fifths of the votes of the proprietors present in person or by proxy, at any special general meeting convened for that purpose, from time to time to convert or to consolidate all or any part of the shares then existing or authorised to be created in the capital of the Company into capital stock, divisible into and transferable in any amounts, and whether of one or more than one denomination, at such time or times, and under such terms and

(a) 7 Vict. c. iii., Local and Personal.



conditions, and particularly as to the dividends, whether fixed or rateable, to be received by the holders of such stock or of any denominations thereof respectively, out of the profits of the undertaking, and the rights and privileges to be conferred on the holders of such stock, as should be determined at such meeting; and (sect. 19) that after such conversion or consolidation should have taken place, or if the Company should create any stock as aforesaid in lieu of issuing the new shares thereby authorised to be created, all the provisions contained in the Acts relating to the Company, which required or implied that the capital of the Company should be divided into shares of any fixed amount, and distinguished by any numbers, should, as to so much of the capital as should have been so converted or consolidated into stock, or raised by the creation of new stock in lieu of shares as aforesaid, cease and be of no effect; and the several proprietors of such stock might thenceforth transfer their respective shares or interests therein, or any parts of such shares or interests, in the same manner and subject to the same regulations and provisions as or according to which any shares in the capital of the Company might have been transferred under the said Acts relating to the Company, except so far as such regulations or provisions, or any or either of them, might be altered by the vote of a general or special general meeting of the Company; and the Company should cause an entry to be made in some book to be kept for that purpose of every such transfer; and (sect. 23) That the several proprietors in the said stock should be entitled to participate in the dividends and profits of the Company, according to the amount of their respective shares or interests in such stock, and to the terms upon which the same might have been created; and such shares and interests in any stock on which no specified amount of annual dividends should have been limited at the time

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—  
*Statement.*

of the creation thereof, should, in proportion to the amount thereof appearing in the books of the Company as belonging to the proprietors thereof, confer on them respectively the same privileges and advantages for the purpose of voting at meetings of the Company, qualification for the office of directors, and for other purposes, as would have been conferred by shares of equal amount in the capital of the Company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the Company, should be conferred by any aliquot part of one hundred pounds of such consolidated stock.

Between the date of the will and the death of the testator, at a meeting of the shareholders of the Company, held in February, 1850, a resolution was passed, in pursuance of the provisions of the Act, whereby different classes of shares were converted into stock of the Company. In pursuance of that resolution, all the shares which the testator had at the date of his will, except the 120 17 $\frac{1}{2}$  shares, were converted into 7000 $\frac{1}{2}$  stock of the Great Western Railway Company. It did not appear whether the testator did or not attend the meeting of proprietors at which this resolution was passed. The testator subsequently purchased 8000 $\frac{1}{2}$  fixed Four-and-a-Half per Cent. Stock in the same Railway Company.

The questions were—1. Whether the Plaintiff, *Arthur Oakes*, was entitled under the bequest to the 7000 $\frac{1}{2}$  Consolidated Stock of the Company, or whether it formed part of the residuary personal estate of the testator. 2. Whether the Plaintiff was entitled, under the same bequest, to the 8000 $\frac{1}{2}$  Four-and-a-Half per Cent. Stock, or whether it formed part of such residuary personal estate.

The questions were raised by a special case.

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Sir *W. P. Wood* and Mr. *Speed* for the Plaintiff. — The questions are, 1. Is the legacy specific? 2. Is it adeemed? In *Shuttleworth v. Greaves* (a), a bequest of "my shares in the Nottingham Canal Navigation" was held specific. So in *Bethune v. Kennedy* (b), a gift of "all I do or may possess in the funds." If the legacy be specific has it been adeemed? There is no ademption where the fund is altered by law, or where the fund remains virtually the same, without an alteration in the testator's intention. Thus, in *Partridge v. Partridge* (c), no ademption occurred by reason of the Act for changing South Sea Stock into Annuities; nor in *Bronsdon v. Winter* (d) by receiving payment of Navy Bills; nor in *Dingwell v. Askew* (e), by the transfer of a fund from the name of a trustee; nor, in *Backwell v. Child* (f), of a share of a testator's interest in a partnership, by the renewal of the partnership contract. The 18th, 19th, and 23rd sections of the 7 Vict. c. iii. (g), shew that in this case there was no alteration in substance in the testator's interest in the property; and that, in fact, a share in the capital of a Railway Company and in the stock of the Company is the same thing; the only difference that can be suggested between them is, that the interest payable on a share would not be divided. In order that an act should operate as an ademption, it must be shewn or appear that the testator intended it to have that effect, or that the subject of the gift had been destroyed. Here it was impossible to suggest any such intention. The testator had no option to prevent the change. If he had voted against the consolidation he would still have been bound by the Act of the Company. If there were not other reasons to exclude a revocation by the effect of the change, the 23rd section of the Wills

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(a) 4 My. & Cr. 35.

(b) 1 My. & Cr. 114.

(c) Cas. temp. Talb. 226.

(d) Amb. 57.

(e) 1 Cox, 427.

(f) Amb. 260.

(g) Supra, pp. 666 et seq.

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Act (a) would prevent the Act from so operating. The 8000*l.* stock, purchased after the date of the will, passed by the bequest, for the like reason,—that shares and stock in a Railway Company are identical. Suppose a testator had two houses adjoining, and devised them by the description of his “two messuages at” &c., the act of taking down the partition between them would not revoke the devise. In *Chapman v. Hart* (b), Lord *Hardwicke* put the case of the removal of goods during a fire, and said that they should be considered as still in the testator’s house. *Ashburner v. M’Guire* (c) distinguished between the case of a voluntary and compulsory payment of a debt. The 8th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) shewed that there was no solid distinction between shares and stock.

Mr. *Craig* for the residuary legatees.—The testator must be taken to have used the word “shares” in the technical sense, which is well known to the dealers in such property, unless there were some evidence to enlarge the interpretation. The Companies Clauses Consolidation Act cannot be regarded on the question of its construction. It may be admitted that the bequest as to the 7000*l.* was specific, but the specific thing did not exist at the time of the testator’s death. It is too wide a proposition to say that ademption depends on intention: 1 *Roper on Legacies*, 4th edition, pp. 329 et seq.; *Badrick v. Stevens* (d).

*Judgment.*  
 —

VICE-CHANCELLOR:—

It is clear that the 8000*l.* railway stock, purchased by the testator after the date of his will, cannot pass under the bequest of all his “Great Western Railway Shares;”

(a) 7 Will. 4 & 1 Vict. c. 26.  
 (b) 1 Ves. 271.

(c) 2 Bro. C. C. 108.  
 (d) 3 Bro. C. C. 431.

and that, if that stock passes under the will, it must be by the effect of the gift of all other the "railway shares" which he should be possessed of at the time of his decease. I am of opinion that the word "shares" in this will must be taken according to its ordinary meaning. The testator, using this word, had, at the date of his will, shares and stock; the latter could not pass by the force of an expression applicable only to the former. If the testator had, at the date of his will, railway stock only, and there were nothing properly and strictly to answer the description of railway shares, then the railway stock might have passed by the gift of railway shares. But, in this case, the testator had shares at the date of his will to satisfy the words which he has used, and you cannot import into the gift another thing that does not answer the description. I must, therefore, declare that the 8000*l.* stock does not pass by the bequest of the railway shares, and that it forms part of the testator's residuary estate.

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*Judgment.*

It was said, that there was this difficulty in distinguishing between the effect of the gift on the 7000*l.* stock, and on the 8000*l.* stock; and that, if the Court were to hold that the 8000*l.* stock could not pass under the description of "railway shares," it could not consistently hold that the 7000*l.* passed by the same description; and on the other hand, it was argued, that, if any of the stock were held to pass, by the same reason all must pass. This argument is more specious than sound. I think that the 7000*l.* stock is well given, not as stock but as the shares which the testator had at the date of his will. The proposition contended for in one case goes to alter the property from that which exactly answered the description at the date of the will; but, in the other case, I am only applying the language of the will to the property as it existed.

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 —  
*Judgment.*

If the testator gave all stock standing in his name at the date of his will, and it turned out there was some stock standing in the name of a mortgagee, the equity of redemption in that stock would not pass; but if it happened, that, at the date of his will, there was stock standing in his name, and that the testator had subsequently mortgaged it, the mortgage would not have adeemed or revoked the bequest. So, in this case, the testator had this property at the time he made his will, and it has since been changed in name or form only. The question is, whether a testator has at the time of his death the same thing existing, it may be in a different shape,—yet substantially the same thing.

I think that the 7000*l.* exists in the same state, substantially, as it existed at the date of the will, and that it passed under the bequest. I think the present case is more strong in favour of that construction, inasmuch as it is not shewn that the testator in any respect concurred in the conversion of the shares into stock.

*Minute.*  
 —

DECLARE that the 7000*l.* Stock passed by the bequest in the will, and that the 8000*l.* Four-and-a-half per cent. Stock did not pass by the bequest, but formed part of the testator's residuary estate. The costs to be paid out of the residuary estate.

1851.

August 6th.

1852.

March 18th.

RAWLINSON v. WASS.

**JOHN RAWLINSON**, by his will, dated in February, 1841, directed his debts, funeral and testamentary expenses, to be paid by his executors out of his personal estate; and he devised and bequeathed his real and personal estate to *Wass* and another, their heirs, executors, &c., upon trust to permit and suffer his daughter *Elizabeth Rawlinson* to have the use and occupation of his pictures, furniture, &c., for her life, and, at any time or times thereafter, with the consent and approbation of his said daughter after his decease, to sell his real estate; and the testator declared that his trustees should stand possessed of the money to be produced from his personal estate, after payment of his debts, and also of the money to arise from the sale of his real estate, upon trust to invest the same in the purchase of freehold or copyhold lands in *England*, or government securities, and stand possessed of the dividends and interest, upon trust, during the life of his said daughter, to pay the rents &c. of the real estate until so sold, and the dividends and interest of the monies arising from such sale, to his said daughter for her separate use; and from and after her decease, then in trust for such persons as his said daughter should by will appoint; and in default of or until such direction or appointment, the testator devised and bequeathed the said freehold estate, funds, and securities, personal estate and effects, unto his heirs and assigns *ex parte maternâ*, as if he had died intestate.

Devise and bequest of real and personal estate to trustees, upon trust for the testator's daughter, for her life, (with power of sale on her consent), and, after her decease, for such person or persons as his daughter should by will appoint; and, in default of such appointment, a devise and bequest of such real and personal estate to the testator's heirs and assigns *ex parte maternâ*, as if he had died intestate; and power (by a codicil) to sink any part of the personal estate, or proceeds of the sale of the real estate, in the purchase of an annuity for the daughter: — *Held*, upon a claim of the daughter against the trustees for the conveyance of the real estate to her, that the heir *ex parte maternâ* was the heir at the death of the testator, and that the daughter was such heir; and the Court directed a conveyance to her accordingly.

By a codicil to his will of the same date, the testator directed, that, in case his said daughter should at any time express her desire that any part or the whole of the funds and money arising from the sale of his real and personal estate should be invested and sunk in the purchase of an annuity for her life, and she should direct the same under

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her hand to be so invested and sunk, his trustees were accordingly to purchase such annuity or annuities as they, with the consent of his daughter, should think most advisable; and he directed such annuity to be paid to her for her separate use, but not by way of anticipation.

*Elizabeth Rawlinson*, the daughter and only child of the testator, survived him, and claimed to be absolutely entitled to the real estate, and called upon the trustees to convey the same to her in fee simple. The question was first brought before the Court by special case, to which the Plaintiff and the trustees only were parties; but the Court refused to determine the question in the absence of any parties who might claim under the limitation to the heirs *ex parte maternâ*. The claim was then filed against the trustees, and the person who, excluding the Plaintiff, was heir *ex parte maternâ*, and heir general of the testator.

*Argument.*

Mr. Rolt and Mr. Currey for the Plaintiff, cited *Doe v. Lawson* (a), *Stert v. Platel* (b), *Pilkington v. Spratt* (c), *Holloway v. Holloway* (d), and *Ware v. Rowland* (e). When the *Vice-Chancellor* called upon the counsel who opposed the claim.

Mr. Bird for the Defendant *Morris*, after contending that in point of form any declaration of the Court upon the point would be premature, the interest of the person entitled under the description of heir *ex parte maternâ* being reversionary; and also that the Court would not pronounce any declaration on the construction of the will as to the real estate, without also extending the declaration to the construction as to the personalty;—argued, that the term heir *ex parte maternâ* could not apply to the daugh-

(a) 3 East, 278.

(b) 5 Bing. N. C. 434.

(c) 5 B. & Ad. 731.

(d) 5 Ves. 399.

(e) 2 Ph. 635.



ter, who was heir general; and that the testator must have contemplated the case of the heirs general being exhausted.

Mr. *Ferrers* for the trustees.

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*Argument.*

The VICE-CHANCELLOR said, that the devise to the heir ex parte maternâ must be construed to mean the heir of the testator at the time of his death; and at that time no person except his daughter (she being his only child) could be such heir; and he directed a conveyance of the estate by the trustees to the Plaintiff accordingly.

*Judgment.*  
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CLIFFORD v. CLIFFORD.

**R**ICHARD LEWIS, by a settlement, made in 1815 on the marriage of his daughter *Frances Elizabeth* with Serjeant *Taddy*, created a term of 500 years in his estates in *Monmouth*, for the purpose of settling the sum of 10,000*l.* on his daughter. The trusts of the 10,000*l.* were, after the decease of Mr. and Mrs. *Lewis*, for Serjeant *Taddy* for life, then for *Frances Elizabeth* his wife for her life, and after the decease of the survivor of them, in case there should be no issue of the marriage (which event happened), upon trust for such person or persons, and for such uses, intents, and purposes as the said *Frances Elizabeth*, notwithstanding her coverture, and as if she were sole and unmarried, should by deed or will appoint; and in default of such appointment, and so far as it should not extend, in trust for and for the benefit of the person or persons

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 13th.*

A testatrix, having a power of appointing a sum of 10,000*l.* secured by a term of five hundred years, and having also a power of appointing the fee of the lands on which the money was secured, by her will devised her lands to *A.* for life, with remainder to *B.* in tail, and gave to *A.* all the residue of her personal estate: — *Held*, that the 10,000*l.* passed under the residuary gift of the personal estate.

Effect of a general release by a party entitled to a charge on real estate secured by a term of years to the trustees of the term, the term itself not being assigned or merged.

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who, under the Statute of Distribution, would have been entitled thereto, in case the said *Frances Elizabeth* had died possessed thereof intestate, and without having been married.

By a deed of the 16th of March, 1835, *Richard Lewis* conveyed his estates in *Monmouth* and *Caermarthen* to and to the use of trustees, upon certain trusts; and, subject to certain interests which became satisfied, the said estates were to go, remain, and be upon such trusts; and subject to such powers and provisions, as *Frances Elizabeth Taddy* should by deed or will appoint; and in default thereof, in trust for *Frances Elizabeth Taddy*, her heirs, executors, administrators, and assigns, absolutely.

*Frances Elizabeth Taddy* survived her husband; and by her will, dated the 7th of February, 1846, gave, devised, and bequeathed all her freehold messuages, tenements, lands, and hereditaments in the counties of *Caermarthen* and *Monmouth*, unto trustees, their heirs and assigns, upon trust, in the first place, out of the rents and profits thereof to pay two annuities, and subject thereto to the use of two persons therein named (since deceased) for their respective lives, with remainder to the use of the plaintiff and his assigns during his life, with remainder to the use of the first and other sons of the Plaintiff as tenants in tail; and the testatrix bequeathed the residue of her personal estate to the Plaintiff for his own use and benefit, and she appointed the Plaintiff executor of her will. The eldest son of the Plaintiff, and the first tenant in tail under Mrs. *Taddy's* will, was a Defendant.

The bill prayed for a declaration, that the Plaintiff was entitled to the sum of 10,000*l.*, and to have the same raised. And that the Defendants, the trustees of the term of 500 years, might be ordered to assign and convey the here-

ditaments comprised in the term for the residue thereof (but subject to the proviso in the settlement for redemption thereof, and for the cesser of the term,) to such person or persons as the Plaintiff should direct.

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The questions in the cause were, first, as to the title of the Plaintiff under the will of Mrs. *Taddy* to have the 10,000*l.* raised; and secondly, as to the effect of a release executed by the Plaintiff in April, 1847, under the following circumstances:—

On the occasion of the marriage of Serjeant *Taddy*, his father created a term of 500 years in his estates in *Surrey* in the trustees of the settlement of 1815, for the purpose of settling 6000*l.*; and, on that occasion, Serjeant *Taddy* himself settled a sum of 1800*l.* Bank Stock. The trusts of the 6000*l.* and Bank Stock were, by the settlement of 1815, declared to be, after the life-interests therein given to Serjeant *Taddy* and his wife, in default of their issue, upon such trusts as Serjeant *Taddy* should by deed or will appoint; and, in default of such appointment, in trust for and for the benefit of the person or persons who, under the statute for the distribution of the estates of intestates, would have been entitled thereto in case Serjeant *Taddy* had died possessed thereof intestate and unmarried. The 1800*l.* Bank Stock was afterwards increased by the addition of two bonuses of 450*l.* and 1375*l.* respectively. Serjeant *Taddy* died in March, 1845, having by his will appointed *John Taddy* his sole executor and residuary legatee. In April, 1847, Mrs. *Taddy* being dead, and the trusts of the settlement of 1815 at an end, (except the ultimate limitation of the Bank Stock), *John Taddy*, who was entitled to the Bank Stock and sums added to it, requested the trustees of the settlement to transfer it to him. The trustees, who had in them the terms of 500 years and 500 years, required a release from *John Taddy* of the

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Bank Stock and bonuses, and also a general release, extending not only to the term and funds settled by Serjeant *Taddy* and his father, but also to the property put in settlement by Mr. *Lewis*. The release of the 14th of April, 1847, recited the settlement, the state of the property, and the deaths of the parties; and that all interest &c., to which Serjeant *Taddy* became entitled as tenant for life under the trusts of the settlement, were duly received by or accounted for to him or to his executor; and that all interest &c., to which the said *Frances Elizabeth Taddy* became entitled as tenant for life under the trusts of the settlement, as having survived her husband, were duly received by or accounted for to her, or to the Plaintiff, her executor; and that no part of the 10,000*l.* covenanted to be settled by *Richard Lewis* was ever raised or paid to the trustees of the settlement; but that the same remained a charge upon the estates by the said settlement charged therewith, and which subsequently devolved to or were settled upon *Frances Elizabeth Taddy*; and which said estates, together with the said charge created thereon, had since devolved upon and become vested in the Plaintiff *Clifford*, as the residuary devisee, appointee, and legatee, under the will of the late *Frances Elizabeth Taddy*, and by virtue of the ultimate limitation in the settlement in default of issue of the said marriage in respect of the 10,000*l.*; and the recital, after referring to the Bank Stock and the 6000*l.*, proceeded to recite that the right to the said sums of Bank Stock and to the 6000*l.* had devolved upon *John Taddy*, as such executor and residuary legatee of Serjeant *Taddy*; and upon whom had also devolved the messuages, lands, &c., still remaining charged with the 6000*l.* under the trusts of the settlement; and that *John Taddy* had applied to the surviving trustees of the settlement to transfer to him the 3625*l.* Bank Stock, and to pay over to him the unapplied dividends thereon, which they had agreed to do, upon *John Taddy* and also the Plaintiff executing

the releases thereafter contained. The deed then, after reciting the transfer of the stock to *John Taddy*, contained a general release by him in terms similar to the release by the Plaintiff. And the Plaintiff thereby, in pursuance of the agreement, and in consideration of the premises, remised, released, acquitted, exonerated, and for ever discharged the trustees from the said recited indenture of settlement, and all and every the trusts, covenants, agreements, and provisions therein contained; and also of and from the said sum of 10,000*l.*, and all other the trust monies and premises in or over which the said *Frances Elizabeth Taddy* had any right or interest or power of appointment whatsoever, under or by virtue of the same settlement; and also of and from all and every other sums and sum of money and stock, actions and action, suits and suit, bonuses, additions, interests, dividends, rents, arrears of interest, dividends or rents, causes and cause of action and suit, accounts, reckonings, balances, charges, losses, gains, claims, and demands whatsoever, which, either at law or in equity, she the said *Frances Elizabeth Taddy* in her lifetime ever had, or which the Plaintiff, as such executor, residuary devisee, appointee, and legatee, under her will or in any other character, had, or which the Plaintiff, or the representative for the time being of *Frances Elizabeth Taddy*, should or might have, from, upon, or against the trustees, for or by reason or on account of the said settlement, or the trusts, covenants, agreements, and provisions therein.

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Mr. *Rolt* and Mr. *Pryor* for the Plaintiff.

Argument.

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Mr. *C. P. Cooper*, Mr. *G. L. Russell*, and Mr. *Alcock*, for the tenant in tail; and Mr. *Chandless* and Mr. *Southgate*, for the trustees of the term.

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*Sir Edward Clere's case* (a), *Farmer v. Bradford* (b), *Denn v. Roake* (c), *Bullock v. Fladgate* (d), *In re Spooner's Trust* (e), were referred to in the argument on the title of the Plaintiff under the will, in the circumstances of the case; and on the effect of the release, *Storer v. Gordon* (f), *Squire v. Ford* (g), and *Solly v. Forbes* (h).

*Judgment.* VICE-CHANCELLOR:—

The first question that is raised in this cause is, whether the 10,000*l.*, secured by the settlement of 1815, passed by the devise of real estate contained in the will of the late Mrs. *Taddy*, or by the bequest of residuary personal estate contained in the same will? I am of opinion that it passed to the Plaintiff absolutely by the disposition of the residuary personal estate.

It is clear, from the case of *Farmer v. Bradford* (b), that the devise of real estate contained in this will would not, before the recent statute of wills (i), have operated as an appointment of the 10,000*l.* The case of *Bullock v. Fladgate* (d), which was cited, has, as it appears to me, no bearing on the question. That case went on the ground, that the property appointed was the same property which was subject to the power,—that the equitable interest in the property to be purchased was co-extensive with the estate sold. Another case was cited (m) in the argument of *Farmer v. Bradford*, in which the power was thought to be well executed by the appointment of the estate itself. That principle is equally clear. There was nothing on which

(a) 6 Rep. 17.

(b) 3 Russ. 354.

(c) 5 B. & C. 720.

(d) 1 V. & B. 471.

(e) 2 Sim. N. S. 129.

(f) 3 M. & S. 308.

(g) 9 Hare, 47.

(h) 2 B. & B. 38.

(i) 7 Will. 4 & 1 Vict. c. 26.

(m) *Pearson v. Lane*, 17 Ves. 101.

the power could operate, except on the monies charged; and, rather than that the power should have no operation, effect was given to it in that manner. Does the recent Wills Act alter the law on this point? I think it does not. By the 27th section, a general devise of real estate operates as an execution of a power over real estate, and a general bequest of personal estate operates as an execution of a power over personal estate; but this has nothing to do with the question whether the execution of a power over real estate shall operate as the execution of a power over personal estate. And the Wills Act not affecting the case, I am of opinion that the 10,000*l.* was well appointed to the Plaintiff Mr. *Clifford* absolutely.

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[His Honour then stated the release, and the circumstances under which it was made, *supra*, pp. 677 et seq.]

The position of the parties, at the date of this instrument, was this: The plaintiff was tenant for life. The deed does not express that he was tenant in fee; the recital is, not that he was tenant in fee, but that the estate, together with the charge created thereon, had devolved upon and become duly vested in him, as the residuary devisee, appointee, and legatee under the will of Mrs. *Taddy*. Being tenant for life, and having a charge upon the same estate, to be raised out of a term of 500 years therein, he discharges the trustees from all claims under the settlement in respect of the 10,000*l.* Now, looking at the cases applicable to this point, it will be found that the effect of the instrument must be governed by the intention of the party. In *St. Paul v. Viscount Dudley and Ward* (a), Lord *Eldon* says, "It has been said, that this is analogous to the case of a tenant for life paying off an incumbrance. It is so in this respect: if the tenant for life, at the time

(a) 15 Ves. 172.

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he pays off the debt in that transaction, merges the security by taking an assignment connecting it with the legal estate of inheritance, upon that transaction *prima facie* there is no charge" (a). In this case, even if the Plaintiff has not merged the 10,000*l.*, does not the release amount to a declaration that the sum shall not be raised? If he had said expressly the sum should not be raised, would not the charge be gone as against the infant, as the evidence of an intention that it should be merged? In *The Earl of Buckinghamshire v. Hobart* (b), a tenant in tail supposing himself to be tenant in fee, raised and paid off a sum of 6000*l.* charged on the estates of which he was tenant in tail, and secured by a term, and at the same time created a fresh mortgage, (part of the sum raised thereby being applied in payment of the 6000*l.*), but the term remained in no way dealt with, and had not been assigned to any one. Lord *Eldon* said: "If we are to advert to cases on the intention of tenants in tail paying off charges, the answer to applying that doctrine to this case is, that the party never conceived himself to be tenant in tail (c);" and it appeared to him that the case was "not one in which the intention of the parties must be taken to have been to maintain the charge, but to destroy it; but it must finally be determined, that, if the whole of the estate cannot be enjoyed according to the whole of the intention, the term, which has never yet been assigned, shall be considered as subsisting to secure the 6000*l.*" (d).

In the state of circumstances in this case, I cannot, on the form of the deed, hold that it did not operate as a declaration of intention that the 10,000*l.* should not be raised; and if the Plaintiff had clearly declared such intention, I think, as against the infant tenant in tail, the charge would have merged.

(a) 15 Ves. 173.  
 (b) 3 Swanst. 186.

(c) 3 Swanst. 201.  
 (d) Id. 202.



It is possible, either that the deed was executed by mistake, and was not in conformity with the intention of the parties, or that there may be evidence, notwithstanding the deed, that the intention of the parties was to keep the charge on foot. It is true, as was observed in argument, that the term has neither ceased under the proviso for cesser nor been merged. It subsisted in like manner in *The Earl of Buckinghamshire v. Hobart*.

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The cause may stand over, in order that the Plaintiff may bring forward any evidence of intention that the 10,000*l.* should not be destroyed by the release, or that the release was framed and entered into by mistake. For this purpose the Plaintiff may amend the bill, by asking either that the deed may be rectified if executed under mistake, or that the intention to retain the charge may be shewn.

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GREGORY v. WILSON.

A BILL by the personal representative of *John Thompson*, for the specific performance of an agreement for a lease. In 1814, *Lady Wilson* was tenant for life of an estate at *Hampstead*, with remainder to Sir *T. M. Wilson* in fee; and Mr. *Thompson* agreed with them to take a lease of about four acres, part of the estate, for a term of seventy-

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The Court refuses to relieve lessees against the legal consequences of breaches of covenant, as well in cases which rest in contract, as where the legal relation

between the parties is fully established.

Neither in cases of accidental neglect to perform the covenants to repair, nor in case of wilful or obstinate breaches of such covenants, will the Court relieve the tenant against the consequences of the breach.

A tenant is not absolved from the performance of the covenants of his lease by a notice to quit: such notice ought rather to be regarded as a notice to be more vigilant in the performance of the covenant.

The fact of there being no personal representative of a lessee on whom the duty of performing the covenants of the lease has devolved, cannot be set up against the landlord.

It must be a strong case of equity created by a landlord against himself to control his legal right

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five years, at an annual rent of 42*l*. There was no written agreement for the lease, but a draft of the lease was prepared by the solicitors of Sir *Thomas* and Lady *Wilson*; and it was admitted that the draft contained the substantial terms of the agreement between the parties, and that the terms contained in it were sufficiently definite to be made the foundation of a decree for specific performance.

The draft lease contained covenants as to the class and value of the house or houses to be erected on the land, and for the keeping of the same in repair; for the surrender of the premises in good condition to the lessors at the end of the term, and for the insurance of the premises; and the lease reserved to the lessors and their survivors the right to examine the state of the premises, and provided that in default of the performance of the covenants or any of them, the demise should be void, and the lessors should be entitled to re-enter.

The draft lease was forwarded to *Thompson* in July, 1814, and he soon afterwards returned it, with some marginal observations and some trifling alterations. No final settlement seemed to have been come to upon these observations and alterations, a further difficulty having arisen as to a right of water which *Thompson* claimed, and which the intended lessors were unable or unwilling to grant; but both parties considered that the agreement would be carried out; and in or about July, 1814, *Thompson* entered on the premises, and laid out 4000*l*. or 5000*l*. in erecting a house and outbuildings thereupon; and he continued in undisputed possession down to the time of his death.

Lady *Wilson* died in the year 1818, and Sir *T. M. Wilson* died in the year 1821. By his will, he devised the estate to uses under which the Defendants were entitled.

*Thompson* died in March, 1843. The rent which accrued due for the premises was paid by him, and accepted by the successive owners of the estate up to Michaelmas, 1842.

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Upon the death of *Thompson*, the right of representation to him was litigated in the Ecclesiastical Court; and in a suit in this Court a receiver was appointed pending the litigation; and at Lady-day, 1846, he paid the rent of the premises up to that time. The suit in the Ecclesiastical Court terminated by letters of administration to the estate of *Thompson* being granted to the Plaintiff *Margaret Gregory*, the wife of the Plaintiff *Barnard Gregory*, on the 16th of March, 1847. And on the 19th of March, 1847, the Defendant Sir *T. M. Wilson*, the first tenant for life under the will of the late Sir *T. M. Wilson*, served on Mrs. *Gregory* a notice to quit the premises on the ensuing 29th of September. This notice was followed by some correspondence between the parties, which led to no result; and thereupon the bill was filed, on the 4th of December, 1847, for the specific performance of the agreement, and for an injunction to restrain proceedings at law.

The points raised by the pleadings, the material facts which appeared in evidence, and the questions which were the subject of the argument, all appear in the judgment.

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Mr. *Bethell* and Mr. *Murray* for the Plaintiff.

*Argument.*

Mr. *Walpole*, Mr. *W. M. James*, Mr. *Rogers*, and Mr. *Swift*, for the several Defendants.

In addition to the cases mentioned in the judgment the following authorities were cited:—*Green v. Bridges* (a),

(a) 4 Sim. 96.

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*Elliott v. Turner* (a), *White v. Warner* (b), *Boardman v. Mostyn* (c), *Gourlay v. The Duke of Somerset* (d), *Lovat v. Lord Ranelagh* (e), and *Doe d. Muston v. Gladwin* (f).

*Judgment.*  
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VICE-CHANCELLOR:—

It has in this case been insisted, on the part of the Defendants, that specific performance of the agreement for the lease ought not to be decreed, upon the ground that there have been such defaults, both as to insurance and repairs, as would, if the lease had been executed, have amounted to breaches of covenant, on which there would have been a right to re-enter and avoid the lease. On the other hand, it was argued upon the part of the Plaintiffs, that the cases in which the Court had refused to relieve against breaches of covenants contained in leases did not apply to a case like the present, where the rights of the parties had throughout rested in contract. That, as to the covenant to insure, the terms of the covenant had never been finally agreed upon; and there could, therefore, be no breach upon which the Court could found its refusal to enforce the agreement; and further, that if the agreement was to be considered as perfect with respect to that covenant, any default in insurance must have been known to the successive landlords, and had been waived or acquiesced in by them, and could not now be set up. That, as to the repairs, it was only in cases of wilful and obstinate refusal on the part of tenants that Courts of equity refused to relieve against forfeitures founded on the non-observance of such covenants. And lastly, that, neither as to the insurance nor the repairs could any advantage be taken of any default occurring after the service of the notice to quit.

(a) 13 Sim. 477.

(b) 2 Mer. 459.

(c) 6 Ves. 467.

(d) 1 V. & B. 68.

(e) 3 V. & B. 24.

(f) 6 Q. B. 953.

As to the point first insisted upon by the Plaintiffs,—the distinction attempted to be drawn upon the case resting in contract, no authority was cited in support of such a distinction; and upon principle I do not think that it can be maintained. The contract is to create a legal relation between the parties, which when created is to be determinable by one party on the non-fulfilment by the other of certain obligations. Possession is taken under the contract. The party on whom the obligations are to rest, obtains on his part the full benefit of the contract. Is a Court of equity to hold, that, until the legal relation is created, the contract is unilateral, and that the party who has the benefit of the contract is not to be subject to the consequences which are stipulated to attach upon the non-performance of the obligations into which he has agreed to enter. It is true, that, until the legal relation is created, the stipulated remedy by re-entry cannot be made available; but it is for this Court to determine whether the legal relation shall be created or not: and surely the Court may well refuse to create it, if it be satisfied that there is such conduct as would justify the immediate dissolution of it, if it were created. There have been many cases in which the Court has refused to create the legal relation, upon the ground, that, if created, it would be immediately dissoluble; and those cases appear to me fully to meet this branch of the Plaintiffs' argument.

But then it was said on the part of the Plaintiffs, that the covenant to insure was never finally settled; and there could therefore be no breach which could justify the Court in refusing a specific performance. It appears, however, that the draft lease contained a covenant to insure in the Sun Fire Office, to the full value of the premises, in the names of the landlords; and although it appears that some pencil alterations were made by *Thompson* in the terms of this covenant, so as to leave it open to him to insure in

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any other office, and to create no obligation as to the amount to be insured, and to provide for the insurance being in the joint names of himself and the landlords; this bill expressly charges that he did not insist on those alterations: and whether he did so or not, it is clear that it was fully agreed that the lease should contain a covenant for an insurance in some office to some amount, either in the names of the landlords solely, or in the joint names of the landlords and *Thompson*; and I must, therefore, I think, consider this case upon the footing that if the lease had been executed, there would have been a covenant for insurance, upon a breach of which there would have been a right to re-enter.

It was then, however, urged on the part of the Plaintiffs, that, assuming there would have been a breach of this covenant if the lease had been executed, the right to take advantage of the breach was gone by waiver and acquiescence; and it cannot, I think, be doubted, that no breach of this covenant anterior to March, 1846, when the last payment of rent was made, and probably no breach of it anterior to the expiration of the notice to quit, could now be taken advantage of at law; but this covenant is a continuing covenant, and there seems to be no ground for insisting upon a waiver beyond the period I have mentioned. And when it is attempted to apply the doctrine of acquiescence to such a case as the present, it must be remembered that the ultimate right which the Court has to deal with, is the legal right, and that a case therefore must be made out, which would justify the Court in controlling that right. The landlord may, no doubt, have so dealt with the tenant as to have created an equity against himself sufficiently strong to control his legal right; but it cannot, I think, be disputed, that a strong case would be required for the purpose.

Passing from the case as to the insurance to the case as to repairs, it was argued for the Plaintiffs, that the Court would relieve tenants against the consequences of such breaches, unless the breaches were wilful and obstinate on their part; and great reliance was placed in this part of the argument upon some expressions which fell from Lord *Eldon* in the cases of *Hill v. Barclay* (a), and *Reynolds v. Pitt* (b), as to wilful and obstinate refusal; but it is obvious, both from those cases and others which were before him, that Lord *Eldon's* opinion was decidedly opposed to granting any relief by this Court to tenants against forfeitures founded on breaches of such covenants; and I think that his observations as to wilful and obstinate refusal, upon which reliance was placed, were meant to distinguish between such cases and cases of neglect arising from mistake or accident; and at all events, I think, that where a man, who knows that he is charged with a legal obligation, neglects to perform it, his neglect to do so must be deemed to be wilful, and, if he persists in it, to be obstinate.

The last point insisted on by the Plaintiffs was, that the Court would not permit advantage to be taken of any default occurring after the notice to quit; and the case of *Dowell v. Dew* (c) was cited in support of this position; but that case does not appear to me to bear out the conclusion attempted to be deduced from it. I do not understand the late Vice-Chancellor *Knight Bruce* to have expressed an opinion in that case, that any serious breaches of covenant on the part of the tenant, occurring after the notice to quit, could be disregarded in equity, upon the mere ground that the notice to quit was pending; and I see no grounds upon which tenants, insisting on the right to retain possession under agreements, can be absolved from discharging the obligations which, by these agreements,

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(a) 18 Ves. 56.      (b) 19 Ves. 134.      (c) 1 Y. & C. C. C. 345.

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they have taken upon themselves to discharge. So far from the notice to quit being regarded as a dispensation by the landlord of the obligations attaching upon the tenant, I am much disposed to think it ought to be regarded as a notice to the tenant to be more vigilant in the performance of his duties. A tenant, who had been lulled into security by his landlord, would, in my opinion, have a much better chance of being relieved in equity, if, immediately upon the notice to quit being served, he set about performing the obligations attaching upon him, than he could have if he persisted in the non-performance of those obligations.

The points to which I have referred were those which were mainly insisted upon by the Plaintiffs; but they also relied on the power, which, according to the terms of the draft lease, was given to the lessors, to enter and give notice of any repairs which might be required to be done, and on the absence of any such notice, and on there having been for so long a period no personal representative of *Thompson*. I think, however, that the covenants to repair after notice would be considered as distinct covenants: *Doe d. Morecraft v. Meux* (a); and that the fact of there having been no personal representative of the lessee could not be set up against the landlord: *Hill v. Barclay* (b). The hardship of Courts of equity refusing any relief against forfeiture to tenants in cases of this description was also much urged upon the Court; but this argument is not, I think, entitled to much weight, for Courts of law in such cases regard the substantial and not the literal performance of the covenant. The Court was also pressed in the argument with the observations of Lord *Cottenham* in *Mundy v. Jolliffe* (c), indicating, that, in cases of suits for specific performance of agreements for leases,

Covenants to  
repair after no-  
tice considered  
as distinct co-  
venants.

(a) 4 B. &amp; C. 606.

(b) 18 Ves. 57.

(c) 5 My. &amp; Cr. 167.



a strong case would be necessary to resist the specific performance; and I agree that a strong case is necessary for that purpose, for this Court, in refusing the specific performance, prevents the question of forfeiture from being tried at law; and therefore, before it refuses its interference, it ought to be well satisfied that there has been a forfeiture on which an ejectment could be maintained.

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[The VICE-CHANCELLOR then applied these observations to the facts of the case. He was of opinion that no evidence whatever had been given by the Plaintiffs that the premises ever were insured; that the Defendants' evidence proved that there had been no insurance in the Sun Fire Office since 1836; that the premises were out of repair in 1843; that they were still more out of repair in 1845; and that in 1847 and 1848 they were in the same or in a worse condition, so far as the witnesses could inspect them; but that they were prevented from inspecting the interior of the premises by the refusal of the tenant to give them access, a refusal which was in contravention of the terms of the lease. And he was therefore of opinion, that, if the lease had been executed, there would have been a forfeiture against which this Court would not have relieved; and, therefore, that the bill must be dismissed with costs against all the Defendants, except Sir *T. M. Wilson*; but, Sir *T. M. Wilson* having, by his answer, disputed the agreement, and failed in that part of the case, as to him without costs.]

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KING v. MALCOTT.

Claim by a lessor for the administration of the estate of his lessee, and to have a sufficient part of the assets impounded to answer future possible breaches of covenant in the lease—dismissed.

It is not a part of the contract between a lessor and lessee, that, on the death of the lessee, his assets shall be impounded to answer the future rent and covenants; and if any portion of the assets are retained or appropriated for that purpose, it is from the right of the executor to indemnity, and not from any right which the lessor has to require such security.

There is no principle on which a Court of equity should extend the legal right or remedy of the landlord, as against the tenant or his estate.

**A** CLAIM by a lessor, in the character of a creditor upon the estate of his deceased lessee. The testator, the lessee, had taken a lease of premises known as *Smith's Ways*, in *Wapping*, dated in May, 1830, for a term of ninety-nine years, at a rent of 450*l.* a year, and had entered into the common covenants, for himself, his heirs, executors, &c., for payment of the rent, and for the due repair and insurance of the premises. The lessee had subsequently assigned the demised property to another person, —a fact which was not considered to be material. The lessee, by his will, charged his debts on his real and personal estate. The claim was filed by the lessor on behalf of himself and all other unsatisfied creditors of the testator, to have the proper accounts of his personal and real estate taken, and the proceeds duly applied in the payment of his funeral and testamentary expenses and debts, including what might become due to the Plaintiff in respect of the rent reserved by the lease; and to have a sufficient part of the proceeds of the estate set apart and invested, and secured in Court, as a due provision for the payment of the rent then due and thereafter to accrue due on the lease, and the due performance of the covenants therein contained on the part of the testator. It was not alleged that there had been any breach of the covenants in the lease, or any rent due at the death of the testator.

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Mr. *Kenyon Parker* and Mr. *Rogers*, for the Plaintiff, argued—1. It was clear that an executor might retain in his hands a sufficient portion of the assets to meet claims which possibly might arise against the estate of the testator by the future breaches of covenants into which he had entered: *Hawkins v. Day* (a), *Simmons v. Bolland* (b),

(a) Amb. 160.

(b) 3 Mer. 547.

*Dobson v. Carpenter* (a), *Fletcher v. Stevenson* (b). 2. It was not less for the security of the lessor than for that of the executors that this rule was established; and it was the duty of the executors to provide for the liability in case it should arise. 3. It was not necessary that a sum should actually be due and payable in order to constitute it a debt. It might be a debt, although payable in futuro: *Blount v. Hipkins* (c). Nor was it necessary, in order to raise a case for setting apart a fund in an administration suit, that it should be absolutely certain the fund would be required for the purpose indicated. Legacies given on a contingency were secured, until it was seen whether the contingency could arise. A specialty debt, as this was, although it were not at this time due, would yet, in the appropriation of assets, be preferred to a simple contract debt now actually due: *Lemun v. Fooke* (d), *Goldsmith v. Sydnor* (e), *Knatchbull v. Fearnhead* (f).

Mr. *Amphlett* for the executors.—The specialty creditor would have no precedence over a simple contract creditor, unless there was a certainty that the specialty debt would become due. The application of the Plaintiff in this case was perfectly novel, and would be attended with most serious consequences to all persons who have become bound in the ordinary covenants contained in modern leases. But the obligation imposed by such covenants did not extend to give the covenantee such a right as he now sought to establish: *Flight v. Cook* (g), *Franks v. Cooper* (h).

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VICE-CHANCELLOR:—

This is the claim of the reversioner in a lease against the executors of his lessee, praying that the usual adminis-

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—  
*Argument.*

*Judgment.*  
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| (a) 12 Beav. 370.                      | (e) Cro. Car. 362.   |
| (b) 3 Hare, 360.                       | (f) 3 My. & Cr. 122. |
| (c) Before Sir L. <i>Shadwell</i> , V. | (g) 2 Ves. 619.      |
| C., reported 4 L. J., Ch., N.S., 13.   | (h) 4 Ves. 763.      |
| (d) 3 Lev. 57.                         |                      |

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*Judgment.*

tration accounts may be taken, including what is or may become due in respect of the rent reserved by the lease; and that the estate of the deceased lessee may be applied in payment of his debts; and to have a sufficient portion of the estate set apart to answer the covenants in the lease. [His Honour stated the substance of the lease, and that portion of the will in which the testator devised and bequeathed his real and personal estate to the Defendants (whom he appointed his executors); upon trust to sell and dispose thereof, and apply the proceeds in payment of his funeral and testamentary expenses and debts, and the legacies bequeathed by his will.] The question is, whether the Plaintiff, who is the assignee of the reversioner on this demise, is now entitled to have the testator's assets thus impounded, for securing himself against possible breaches of the covenants. There has hitherto been no breach of covenant upon which any legal debt is due. No action would now lie against the executors for the purpose of compelling payment of any rent in arrear, or any damages for repairs. Not only is there no rent due, but there is no certainty that anything ever will be due on any of these covenants; for if the rent be paid at the day, and if the other covenants be duly observed, no action will ever lie upon any of them. This case is therefore readily distinguishable from the cases which have been mentioned. Where there has been a bond or covenant for the absolute payment of a certain sum of money, there the money must become due, and must become due on the bond or covenant. In the general decree for the administration of a testator's estate in a suit for that purpose, the usual reference is to take an account of all debts due and owing from the testator. If the testator were a tenant of leasehold premises, and no rent be due from him, no debt is proveable by the lessor under that decree in respect of any such rent. The Court, in the administration of the estate, deals with the legal rights of the parties; and the Court in such a case

finds nothing in fact due at law to the lessor from the testator or his estate. But, suppose that rent afterwards becomes due, and that proceedings are or may be taken by the landlord, what is then the course of the Court? The proceedings must be against the executor; and on the application of the executor, the Court refers it to the Master to ascertain what is due to the lessor, and what provision should be made for the future in respect of the obligations arising from the lease; and a sum of money is commonly set apart to answer what may be required. This course is taken, not because of any right which the creditor has to come in under the decree, but in consequence of the right of the executor to an indemnity against legal liabilities out of the assets. The creditor, not being so at the time of the decease of the testator, but having afterwards become a creditor by reason of the testator's covenant, was not entitled to go in under the decree.

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 Judgment.

Why should the lessor have any such right as he claims in this case? How can it be the result of the relation between landlord and tenant? The landlord has not bargained with his tenant that the tenant's assets, or any fund whatever should be impounded for the purpose of securing his rent, or the due performance of his covenants. He has contracted for no such security. For the rent and for the performance of the covenants, he looks to the personal security of the lessee, or to the rights which he has expressly reserved to himself over the subject of the demise; and farther than that he cannot proceed at law: why should a Court of equity give a more extended effect to the obligation contracted between a landlord and tenant than is given by a Court of law?

The case was likened in the argument to the case of contingent legatees. It was said, that such legatees, and who, being volunteers, are not to be more favoured than creditors, have the right of retaining and impounding the

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assets of their testator. But every legatee has a present right, and the fund is impounded to answer the demand which exists and is created by the will. The argument overlooks the difference between a contingent debt and a contingent legacy. A contingent legacy is separated from the assets, or secured, because it is a sum which in any event is certainly payable to some person, though it may be uncertain to whom it will become payable. But a contingent debt is a sum which it is altogether doubtful whether it will ever be taken out of the assets. Even in the case of a contingent legacy, the legatee is not, as it was assumed at the bar, entitled to have a sum actually retained or appropriated, to answer the legacy when the contingency arises. That is not an unusual way of providing for the legacy, but it is a matter of arrangement, not of right; and in strictness the legatee is only entitled to have security for the payment of the sum, should the contingency arise. The case of *Webber v. Webber* (a) illustrates the distinction.

How does the case stand on authority? There is the distinct authority of Lord *Redesdale* in *Lynar v. Mills* (b), which, (except that the case related to the performance of a covenant and not to the case of rent), in every respect governs the present case. There the testator had covenanted to pay an annuity, and assigned a terminable fund for securing it; and he had further covenanted, that, if such terminable fund should fail, all his real and personal property should be charged with the payment of the annuity. On a bill brought by the annuitant against the executors for an allocation of part of the testator's assets to answer the annuity, the terminable fund having not yet failed, Lord *Redesdale* said: "I cannot allocate any part of the property in this case; it would be tying up two parts of the property for the same purpose. The particular fund,

(a) 1 S. & S. 311.

(b) 2 Sch. & Lef. 338.

which is ample whilst it lasts, and also part of the general estate, producing the same income. The intention of the deed was, that no additional security for payment of the annuity should be given, except upon the deaths of both the persons for whose lives the pension was granted. The Plaintiff has made her bargain and taken a particular security, and now files this bill in direct contradiction to it" (a).

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Judgment.

What is the case between landlord and tenant? Here the landlord has the security of the leasehold property itself, and also the general liability of the whole personal estate of the testator in case the leasehold itself should be insufficient. A case like the present is in fact immediately afterwards referred to by Lord *Redesdale*, in the same judgment. He says: "Every covenant in a lease may be broken; yet was it ever held that a party could come here to have personal assets allocated to answer such possible breaches? Such a bill might possibly be entertained if it were alleged and appeared that the executor had wasted the assets, but that is not pretended here" (b). The case thus put by Lord *Redesdale* is one of considerable difficulty, although there are I believe some earlier authorities tending that way. Even in such a case, if the executor were committing waste, there would appear to me to be great difficulty in a Court of equity treating that, as a legal debt, which is not a legal debt. However, I do not intend to say anything on that question without a review of all the authorities. The question does not arise here, there being no pretence that the executors are wasting the assets. If this claim could be sustained it would prevent the administration of the estate of a testator, although the executor may be willing to take a security in respect of contingent liabilities; and the estate of no lessee could ever be distributed within any reasonable period after his decease. I must dismiss this claim (which is an experiment) with costs.

(a) 2 Sch. & Lef. 339.

(b) Id. 340.

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March 12th.

April 1st.

Devise of a copyhold to such uses as *A.* and *B.*, or the survivor of them, or the executors or administrators of the survivor, or the trustees or trustee of the will for the time being, should by deed appoint; and, subject thereto, to the use of *A.* and *B.*, their heirs and assigns for ever; with a direction to sell and stand possessed of the proceeds upon certain trusts. After the death of the testator, *A.* and *B.* sold the copyhold estate, in pursuance of the trusts. The lord of the manor required that *A.* and *B.*, the devisees, should be admitted, before the admission of the purchaser. On the bill by *A.* and *B.*, the vendors, against the purchaser, to compel a specific performance of the contract, the Court held, that the copyhold tenant might direct the lord

## GLASS v. RICHARDSON.

A SUIT for specific performance. The Plaintiffs derived their title under the will of *Henry Bayford*, dated the 30th of January, 1850, whereby he devised all his freehold and copyhold hereditaments to such uses as the Plaintiffs, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of that his will, should by deed appoint; and, subject thereto, to the use of the Plaintiffs, their heirs and assigns, for ever; and directed that his trustees should, as soon as conveniently might be after his decease, sell the hereditaments devised, and stand possessed of the proceeds, upon the trusts of his residuary personal estate, with power to his trustees to give discharges; and he appointed the Plaintiffs to be the executors and trustees of his will. After the death of the testator, and on the 4th of June, 1851, the Plaintiffs caused the premises in question, which were part of the testator's copyhold hereditaments held of the manor of *Furneaux Pelham*, in the county of *Hertford*, to be put up to sale by public auction; and they were purchased by the Defendant. The Defendant, it appeared, soon after the purchase, entertained a doubt whether he could legally compel admittance to the copyhold under a bargain and sale or appointment from the Plaintiffs, without the Plaintiffs having been themselves first admitted to the premises; and he suggested the doubt to the solicitor of the Plaintiffs, by way of objection to the title. The Plaintiffs' solicitor, of course, denied the validity of the objection; and the Defendant then inquired of the steward of the manor whether he would admit him

to admit into the tenancy either such person as *A.* should nominate, or *A.* himself; that it was the exercise of the right of the tenant to nominate alternatively in favour of *A.* or the nominee of *A.*, and not a double exercise of his right to nominate, first, in favour of *A.*, and then in favour of the nominee of *A.*; and that the purchaser was bound specifically to perform the contract.



as a purchaser from the Plaintiffs, without first requiring the admittance of the Plaintiffs; to which inquiry the steward replied, that the Plaintiffs must be admitted, and pay a fine, after which they might surrender to a purchaser. Some correspondence ensued on the part of both parties with the steward, which led to no result,—the steward still requiring that the Plaintiffs should first be admitted; and, the Plaintiffs not having submitted to this requisition, the usual proclamations for want of a tenant were made in the lord's court. The lord seized quousque; and an ejectment for the recovery of the premises was depending when the suit was instituted by the vendor against the purchaser.

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Statement.

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Mr. Rolt and Mr. Rogers, for the Plaintiff, relied on *The King v. The Lord of the Manor of Oundle* (a), *Boddington v. Abernethy* (b), *Beal v. Shepherd* (c), and *Holder d. Sulyard v. Preston* (d).

Argument.

Mr. Lee for the Defendant.—On this question the case of *The King v. The Lord of the Manor of Oundle* ought not to weigh with the Court, for it is clearly not in accordance with principle. The doctrine of the existence in the same person of an estate and a power, even as to freehold estates, led to a great infringement of principle; for it was held, that the devisee could not reject the estate and take the power, for the power added to the fee was nugatory: *Maundrell v. Maundrell* (e). Conveyancers in framing limitations carefully avoid, where they confer powers, giving any estate. In the case of *Holder v. Preston*, the lord had no fine, inasmuch as it was the case of a mere common law authority. There is no authority, earlier than the last

(a) 1 A. & E. 283.

(b) 5 B. & C. 776.

(c) Cro. Jac. 199.

(d) 2 Serjt. Wils. 400.

(e) 7 Ves. 582.

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 —  
*Argument.*

twenty years, for the proposition that a power may exist over a copyhold estate in the person who has the estate subject to the power. The present case is a scheme and experiment for the purpose of depriving the lord of his right, in which he has as much a vested interest as the tenant.

Mr. *Haddan* on the same side.—The distinction between the *Oundle* case and *Holder v. Preston* and the present case, is, that this is one of an authority coupled with an estate; whereas in *Holder v. Preston* it was a naked authority, and the decision proceeded expressly on that ground. In the *Oundle* case, although there was an estate in the donee of the power, yet, inasmuch as it was a transaction by deed inter vivos, and not by will, the original surrender remained in (and would so remain until the admittance of) the appointee under the power; and, consequently, the tenancy was full, and the lord could not complain. The *Oundle* case was decided on that ground. In this case it was a devise subject to a power, and the former tenant having died, unless the devisees be admitted pending the execution of the power, there would be no tenant and the lord might seize. In fact, wherever there is an estate there is a fine; and the principle is not touched by any of the decisions cited.

The cases of *Edwards v. Champion* (a), and *Carey v. Askew* (b), were also mentioned.

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VICE-CHANCELLOR:—

*Judgment.*  
 —

The sole question between the parties is, whether the Defendant ought to be compelled to complete the purchase

(a) 1 De G. & S. 75.

(b) 2 Bro. C. C. 58; *S. C.*, 1 Cox, 241.

on having a proper deed of appointment from the Plaintiffs, without the Plaintiffs having been first admitted to the premises. The question which the Court has to try in this case, as in other cases of the like nature, is attended with peculiar difficulty. The Court has to determine, in the absence of a third party by whom a claim is or may be advanced, whether there is any just foundation for the claim. On the one hand the Court has to take care that the just rights of the party asking for its interference are not defeated by the assertion of an unfounded claim; on the other hand it has to take equal care that the party against whom its interference is sought, is not exposed to the danger and expense of contesting a claim, which may be founded upon substantial grounds.

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Judgment.

The question, as Lord *Cottenham* says in *Grove v. Bastard* (a), in such cases, is, what is the value of the objection? and I will consider the present case in that point of view,—first upon principle, and secondly upon authority.—And first upon principle:—The will of a copyhold tenant, as I apprehend, is nothing more than a direction to the lord as to the person who is to be admitted into the tenancy. The tenant may direct the lord to admit into the tenancy any person whom he names; or, as is established by the cases with reference to authorities given for the sale of copyhold estates, he may direct the lord to admit into the tenancy any person who may be nominated by the party who is authorised to sell. Upon what principle, then, can it be said that he cannot direct the lord to admit into the tenancy either such person as A. shall nominate, or A. himself, if he makes no nomination. If A. nominates, the nominee of A. is the nominee of the testator; and the direction is to admit him. If he does not so nominate, the direction is to admit A. It seems to me to

(a) 2 Ph. 619.

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 Judgment.

be no more than an exercise by the tenant of his right to nominate alternatively in favour of the nominee of A., or of A., and not a double exercise of his right to nominate first in favour of A., and then in favour of the nominee of A.

The argument on the part of the Defendant, as I understand it, was, that in the case of freehold estates the co-existence in the same party of the fee, and of the power to appoint the fee (which it was said had only been established in modern times), depended wholly on the Statute of Uses; and that, the Statute of Uses not applying to copyholds, the power and the fee could not co-exist; but this argument assumes, that, in the case of copyholds, the power and the fee would co-exist, which is not the case at all events before admittance, as the devisee takes no estate until admittance; and to adopt this argument would be to apply to estates not in any manner affected by the Statute of Uses, doctrines and doubts affecting conveyances of estates operating under that statute; and which, after what fell from Lord Eldon in *Maundrell v. Maundrell* (a), I am warranted in saying never had any solid foundation.

Looking at the case in this point of view, the true question as I think must be, not whether the power and the fee can co-exist under a conveyance of freehold estates operating by the Statute of Uses, but how the case would have stood as to freehold estates if the Statute of Uses had never passed. Let us suppose, then, a feoffment to have been made, before the statute, to such uses as the feoffor should appoint, and in default of appointment to the use of the feoffor. There can, I apprehend, be no doubt that if in such a case the feoffor had directed the feoffee to convey to the use of a third party, a Court of equity would

(a) 10 Ves. 246.

have compelled the conveyance; and so far, therefore, as this argument applies, it seems to me to be more favourable to the case of the Plaintiffs than to the case of the Defendant; and with reference to its bearing upon the question, it may not be unimportant to observe, that until modern times the power of compelling admissions to copyholds belonged to Courts of equity, and was not exercised by Courts of law.

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*Judgment.*

There is, however, this distinction between the cases of freehold and copyhold estates,—that, in the case of copyhold estates, the rights of the lord are to be considered; and no doubt those rights must be protected. It is to be seen, therefore, whether the rights of the lord are interfered with by the copyholder having devised his estates to such uses as his trustees should appoint, and subject thereto to the use of his trustees. It is said that they are, because the estate is devised contrary to the common practice of giving a mere authority to sell. But what is the effect of the devise? Only, as I apprehend, to give the devisee a right to be admitted; just as in the case of a mere power to sell, the heir may be admitted before the authority is exercised. But then it was said, that the lord must always have a tenant, and that the devisee could not be tenant until admittance, although the heir might; and it may be granted, that, for most purposes, the heir is tenant without admittance: but, until he has paid his fine, he is not complete tenant, any more than the devisee; and the cases of heir and devisee do not therefore appear to me to differ in any essential degree, so far as the rights of the lord are concerned; his rights are equally secured in either case: he may proclaim and seize, if the party do not come in and take admittance.

Difficulties were suggested as to the power being exercised after the admittance of the devisee; but no such dif-

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*Judgment.*

ficulties arise in the present case; and it is unnecessary, therefore, to consider them.

Upon principle, therefore, I think that the objection which has been raised on the part of the purchaser cannot prevail; and, so far as respects authorities, I think that the distinctions relied on, on the part of the purchaser, are not sufficient to take the case out of the range of *Boddington v. Abernethy* (a) and *The King v. The Lord of the Manor of Oundle* (b); and that, in principle, those cases decide the question in favour of the vendor.

It was further objected, on the part of the purchaser, that he would be subjected to expenses in obtaining admittance, in consequence of the lord having made the seizure and brought the ejectment. But this is the consequence of his own act, in having raised an objection which, in my opinion, he is not in a condition to maintain. I must leave him, therefore, to settle with the lord. If he had taken from the vendors the conveyance, which, in my opinion, he was bound to take, these expenses would not have been incurred.

My decree, therefore, must be as follows:—The parties having agreed that the sole question in dispute in the cause is, whether the Defendant is bound to complete the purchase of the copyhold premises in the pleadings mentioned, on having a proper deed of appointment or conveyance from the Plaintiff, without the Plaintiff having been first admitted to the said copyhold premises: and having submitted such question to the judgment of the Court, the Court declares that the Defendant was and is bound to complete the said purchase, on having such proper deed of appointment or conveyance made to him by the said Plain-

(a) 5 B. &amp; C. 776.

(b) 1 A. &amp; E. 283.

tiffs, and refers it to the Master to settle the deed in case the parties differ about the same. The purchaser must pay the costs of the suit.

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Judgment.

Affirmed by the Lords Justices on appeal.

M'DONNELL v. POPE.

THE Plaintiff, the landlord of a house at *Chepstow*, filed his claim to recover from the estate of *Anna Maria Pope* the rent of the premises from July, 1847, to October, 1849. The defence to the claim was, that the rent was paid up to January, 1848, and that the estate of *Anna Maria Pope* was not liable for the rent beyond that period. The payment of the rent to January, 1848, was not denied; and the liability of *Anna Maria Pope's* estate for the rent beyond that time depended upon two points: first, whether the premises were originally let to *Anna Maria Pope* alone, or to her and the Defendant *Charlotte Pope* jointly; and, secondly, whether, assuming the premises to have been originally let to *Anna Maria Pope* alone, the Plaintiff adopted *Charlotte Pope* as tenant, and discharged the estate of *Anna Maria Pope*.

April 22nd,  
& 28th.

A new letting to an old tenant, commencing immediately, operates as a surrender of the original term, because the lessor could have no power to create the new term, if the original term had subsisted; and, for a like reason, a new letting to a third party, with the assent of the original tenant, has the same operation.

The above principle forms the ground of the decision in *Thomas v. Cook* (2 B. & A. 119); and the authority of that case ought not to be carried further than the reason on which it rests.

Mr. *Rolt* and Mr. *Martindale* for the Plaintiff.

Mr. *Daniel* and Mr. *Druce*, for the Defendants, cited *Thomas v. Cook* (a) on the point that the circumstances amounted to an acceptance by the Plaintiff of *Charlotte Pope* as his tenant.

The case of *Creagh v. Blood* (b), was cited in reply.

(a) 2 B. & A. 119.

(b) 3 J. & L. 133.

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 v.  
 POPE  
 —  
*Judgment.*

VICE-CHANCELLOR:—

I have carefully read through all the affidavits in the case, and I am fully satisfied, that, in the state of the evidence before me, I must consider that the premises were originally let to *Anna Maria Pope* alone. The affidavit of *Dowle*, the Plaintiff's agent, distinctly states the fact; and the affidavits on the part of the Defendants do not negative it. Several circumstances were indeed pointed out as calculated to raise doubts upon the point, and cast suspicion upon the evidence of *Dowle*; but if the letting was not to *Anna Maria Pope* alone, it must have been to her and the Defendant *Charlotte Pope*; and the Defendant *Charlotte Pope* does not venture to assert that this was the case. I cannot go the length of acting upon inference and suspicion against a positive affidavit, not contradicted by a party who, if it was untrue, could readily have contradicted it. I am of opinion, therefore, that the defence cannot be maintained upon the first point.

Upon the second point, the case is, I think, more open to doubt; but I am of opinion that the defence fails upon the second point also. It was urged, on the part of the Defendants, that, as to this point, the case fell within the principle of *Thomas v. Cook* (a); but that case has been repeatedly explained (and no where more clearly than in *Graham v. Whichelo* (b)) to have proceeded upon the assent of all the parties; and I take it to rest simply upon this ground,—a new letting to an old tenant, commencing immediately, operates as a surrender of the original term, because the lessor could have no power to create the new term if the original term subsisted; and, for the like reason, a new letting to a third party, with the assent of the original tenant, shall have the same operation. The case, as so understood, does not appear to me to be open to

(a) 2 B. & A. 119.

(b) 1 C. & M. 188.



much objection; but any attempt to carry it beyond the reason on which it is founded, would evidently be attended with the most dangerous consequences; and to apply it to a case like the present would, I think, be to carry it beyond the reason on which it rests; for, in this case, the only rent received after the death of *Anna Maria Pope* is expressed to have been received from her executors through the payment of the Defendant *Charlotte Pope*; and, after weighing the observations which were made upon the correspondence, it is impossible, I think, to give greater effect to it than was given to the receipt of the rent in *Graham v. Whichelo*. It could create no tenancy in *Charlotte Pope*; and although there was an acceptance of a new tenant in 1849, this does not appear to have been assented to by the executors; nor do I see how, if they had assented to it, it could be held to have related back and created a tenancy before that period. This appears to me to be an answer to the attempt which was made to rest the case upon the doctrine of estoppel. I am of opinion that the Plaintiff is entitled to a decree for an account of the rent and the usual accounts of the estate, assets not being admitted; but, under the circumstances of the case, I shall give no costs to the hearing.

1852.

M'DONNELL

v.

POPE.

Judgment.

1852.

April 27th  
& 28th.

May 4th.

A bequest to the family of *G.*, held not to be void for uncertainty; but construed to be a gift to the children of *G.*, (an uncle of the testator, known to and on terms of intimacy with him,) as joint tenants, and not to include the parents or their grandchildren.

## GREGORY v. SMITH.

THE testator, *A. F. Wornell*, by his will, made the 13th of August, 1832, after giving 1000*l.* to his wife, gave the remainder of his property to his wife and father, to be divided in equal proportions; and that they, as executors of his intentions, should carry on or dispose of his business, as and when they thought proper; and directed that, after the death of his wife and father and mother, the bulk of the property, exclusive of the 1000*l.*, should be given to the families of *Gregory* and *Gear*.

After the death of the wife and father of the testator, the bill was filed by the children of *George Gregory* and the surviving children of *Mary Gear* against the representative of the wife, who survived the father, for the distribution of the estate. The Court, at the hearing, directed the Master to inquire and state who were the next of kin of the testator at the time of his decease, and whether the Defendants *George Gregory* and *Mary Gear*, who were an uncle and an aunt of the testator, were the persons intended by the testator by the description of the families of *Gregory* and *Gear*; and if he should find that they were, then to inquire and state what children and descendants there were of the said *George Gregory* and *Mary Gear*, and when they were respectively born; and if he should find that the said *George Gregory* and *Mary Gear* were not the parties intended by the said description, then to inquire and state who were the parties so intended.

The Master found who were the next of kin of the testator; and that, at the time of making his will and of his death, he was well acquainted and upon intimate terms of friendship with the Defendants *George Gregory* and *Mary Gear*, and with the Plaintiffs, the children of *George Gregory*

and the children of *Mary Gear*, and two deceased children of *Mary Gear*; and that, besides such Plaintiffs, Defendants, and deceased children, there was not any other person of the family of *Gregory* or of the family of *Gear* who was living at the date of the will, and who was in any way related or known to the testator. And the Master therefore found that the Defendants *George Gregory* and *Mary Gear* were the persons intended by the testator, in his will, by the description of *Gregory* and *Gear*.

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Mr. *Humphry* argued, that the two families, meaning thereby the children of *George Gregory* and *Mary Gear*, took the property as joint tenants; and that it was divisible amongst the ten survivors in equal shares: *Barnes v. Patch* (a), *Wood v. Wood* (b), *White v. Briggs* (c).

*Argument.*  
—

Mr. *Hall*, for the representative of a deceased child of *Mary Gear*, argued, also, that "families" meant the children, but that they took as tenants in common; and that a child who survived the testator, but afterwards died, took a share.

Mr. *W. R. Ellis*, for grand-children of *Mary Gear*, including children of children who were alive when the fund became divisible, and children of children who survived the testator and died before the fund became divisible, cited *Batsford v. Kebbell* (d), *Cruwys v. Colman* (e).

Mr. *Goldsmith*, for *George Gregory* and *Mary Gear*, the parents of the two classes of children, cited *Blackwell v.*

(a) 8 Ves. 604.  
(b) 3 Hare, 65.  
(c) 2 Ph. 583.

(d) 3 Ves. 363.  
(e) 9 Ves. 319; 1 Roper's Leg.  
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*Bull (a), In the Matter of Parkinson's Estate (b), and Beales v. Crisford (c).*

Mr. *Drewry*, for the next of kin of the testator, contended, that the gift was void for uncertainty. The "families of *Gregory* and *Gear*" was an expression too indefinite to be ascertained. It would in a large sense include an entire kindred or clan, all those bearing a particular name, or derived from a common stock; and there was no authority for restricting its meaning: *Doe d. Hayter v. Joinville (d)*, *Cruwys v. Colman (e)*, *Robinson v. Waddelow (f)*.

Mr. *Bichner* for another Defendant.

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VICE-CHANCELLOR:—

*Judgment.*  
 ———

It has been contended that this bequest is void for uncertainty, from the impossibility of deciding which of the many interpretations of the word "families" ought to be adopted. If the meaning of the testator cannot be ascertained, the bequest is no doubt void; but it is the duty of the Court to ascertain the meaning, if it be possible. Now I think the meaning of the word "family" is *primâ facie* children, and that that construction ought to be adhered to, unless some reason be found in the context of the will for extending or altering it. It was argued, that the expression "families of *Gregory* and *Gear*" did not necessarily import the families of any particular persons, but might be read as if the words had been *Gregory* family and *Gear* family. It occurred to me that any question on this point might be precluded by the terms of the decree,

(a) 1 Keen, 176.

(b) 1 Sim., N. S., 242.

(c) 13 Sim. 592.

(d) 3 East, 172.

(e) 9 Ves. 319.

(f) 8 Sim. 134.

which referred it to the Master to inquire whether the Defendants, *George Gregory* and *Mary Gear*, were the persons intended by the description of the families of *Gregory* and *Gear*. I do not think, however, that the decree was intended to determine this point; and I am of opinion that the Court, in now construing the will, is not bound by the form of the decree. Upon considering the argument to which I have referred, I do not see any ground for distinction between the effect of a gift to the families of *George Gregory* and *Mary Gear*, and a gift to the *Gregory* and *Gear* families. There do not appear to be any other families known to the testator than those pointed out by the Master's report; and there is nothing, therefore, which would justify me in distinguishing this case from that of *Barnes v. Patch* (a). There the gift was to "brother *Lancelot's* and sister *Esther's* families." Any attempt at distinction between the two cases would, I think, be unsound. On the authority of *Barnes v. Patch*, I must, therefore, declare that the children of those two persons are entitled, and that the parents are not included. Whether, originally, under a gift to *A.'s* family or the family of *A.*, *A.* should not have been included in the benefit of the bequest I may possibly doubt; but it will be much better to abide by the decision in *Barnes v. Patch* than to draw any distinction between the cases, for which there is no sufficient ground.

The next question is, whether the grand-children of *George Gregory* and *Mary Gear*, born after the death of the testator, take any interest in the fund; and in support of the argument on their behalf, the case of *Batsford v. Kebbell* (b) was cited, and it was contended, that nothing was vested until the death of the father, mother, and wife of the testator. *Cruwys v. Colman* (c) was also cited in

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(a) 8 Ves. 604.

(b) 3 Ves. 363.

(c) 9 Ves. 319.

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favour of the same construction, where the legacy vested in the next of kin at the death of the tenant for life. But the effect of the construction in *Batsford v. Kebbell* is not to alter the class to take under the gift, nor does the case of *Cruwys v. Colman* alter the class. The effect of those cases is only to vary the persons who are to take as members of the class. The meaning of the gift to the "families" of these persons is not altered by reference to these cases; and I am of opinion that the grand-children are not entitled.

The only remaining question was, whether the legatees could take as tenants in common or as joint tenants,—two of the children of *Mary Gear*, who were living at the date of the will and of the death of the testator, having died before the widow of the testator. There is no doubt the Court leans to the construction which creates a tenancy in common; but there must be something to alter the legal effect of the language which is used; and upon examining this will I cannot find any ground for holding that the will creates a tenancy in common. To hold it to be a tenancy in common because the fund must be divided for the purpose of payment, would be to adopt a principle that would convert every joint tenancy of an equitable interest into a tenancy in common.

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June 11th,  
12th & 13th,  
Nov. 5th.

EAST v. TWYFORD.

THE Plaintiff claiming to be tenant in tail of certain estates which had been purchased in pursuance of directions contained in the will of Sir *Gilbert East*, executed a disentailing deed, for the purpose of converting his supposed estate tail into a fee simple, and filed his bill for a conveyance of the legal estate. The question was, whether the Plaintiff took an estate tail, or an estate for life only. The material parts of the will, which was voluminous, are stated in the note (a). The judgment of the *Vice-Chancel-*

Bequest of property (monies to be laid out in land) to *L.*, and afterwards to his eldest lawfully begotten son, &c., remainder to others in succession; with a direction, that, in case of the decease of an eldest son, in any of the cases,

then the property to go to the second son, and so on according with primogeniture; but in every case a grandson to inherit before a younger son, and before the next named in the entail, or any of his sons:—*Held*, upon the language of the whole will, that the testator did not regard *L.* as the stock or stirps, but looked to the sons of *L.* as the parties from whom the property was to devolve in succession; and that *L.* took an estate for life only.

The fact, that, wherever a limitation occurred in the will in favour of sons, it was accompanied by the provision that they should take in order of primogeniture, and that there was no such provision as to grandsons—*held* to indicate that the sons were intended to take by particular description, and the grandsons as a class.

(a) The first part of the will was dated the 10th of January, 1819, and related principally to the property comprised in No. 1,—the funded property, and in No. 2,—the *Field* estate. The part relating to the property comprised in Number 2, was divided into two branches, one branch containing the limitations of the property, and the other branch the particulars of it, and the terms and conditions which attached to the limitations. The first branch, after an introductory declaration that the instrument was the testator's will (see 13 M. & W. 201), proceeded: "I do also hold forth to the direct

execrations and infamy any person or persons endeavouring to alter or to overset, by suffering a recovery, by any Act of Parliament, or in any other way, these directions herein set down for their own or any other person's interest; and further, that, if the injunctions and directions in Number 1 be not most fully and rigidly adhered to in every respect by the individual first to inherit after *K.* (b) and therein set down, that then I order and bequeath the property aforesaid, set down and particularised in Number 1, to go to *M.* (c); if not, to *L.* (d); and afterwards to his eldest lawfully-begotten son; &c.,

(b) *Eleanor Mary East* (Lady *East*).

*Robert Clayton.*

(c) The second son of *William*

(d) *Gilbert East Clayton*, now *G. E. G. East*, the Plaintiff.

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lor shews the form in which the argument was presented to the Court.

on the sole condition of their fully and unequivocally conforming to the conditions therein set down, but not otherwise. If he or they shall not, in every respect and tittle, conform thereto, then, and in that case, I leave and bequeath the property aforesaid in Number 1, to *N. (a)*; and, at his decease, to his eldest legitimate son, &c.; and in case he or they shall not, in like manner, rigidly and fairly comply with these conditions in Number 1 set down, then I bequeath the said property to ———; and at his decease, to his eldest legitimate son, &c.; now, in case of his or their non-compliance in any respect to the conditions set down in Number 1, then the said property shall go to *O. (b)*; and, at his decease, to his eldest legitimate son, &c., but still only if he and they do unconditionally comply with its orders and directions. In case of the decease of an eldest son in any of the abovenamed cases, or in any subsequently named, then the property in Number 1 shall go to the second legitimate son, and so on according with primogeniture; but it is my will and order that in every case a grandson shall inherit before the next named in the entail, or any of

his sons. If ——— or his sons shall not comply with the terms here specified most particularly, the property set down in Number 1 shall go to *P. (c)*; and at his decease to his eldest legitimate son, &c.; and again, in case of non-compliance in the last-named, or any one of his sons, who may be entitled to inherit by the conditions of this will, I, in that case, bequeath the property set down in Number 1, to *Q. (d)*, and then to *V. (e)*, and his eldest son, &c., after his decease; and if neither he or they, or any one individual herein set down or designated, though unborn, shall fully bind himself or themselves to adhere to its conditions unequivocally, then, and in that case, I hereby bequeath all the property set forth in Number 1 aforesaid, to increase the funds of my almshouse, which may then be extended in every way twenty fold or more. Now it will be the business and interest of course of the person next to inherit the property set down in Number 1, to make full inquiries as to the fulfilment of the orders and conditions required; and if he do find that such orders and conditions are not, or have not, been fully, fairly, and unconditionally

(a) The eldest son of *Richard Rue Clayton*.

(b) The eldest son of *Augustus Philip Clayton*.

(c) The eldest son of *William Tonge*.

(d) *William Capel Clayton*.

(e) *Gilbert East Joliffe*.



Mr. *James Parker*, Mr. *Rolt*, and Mr. *Bates*, for the Plaintiff, in support of the bill, cited *Robinson v. Robin-*

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complied with, then I hereby order him, without further delay, to claim and take possession of the property set down in Number 1 in his right. This will, of course, be done through the medium of the executors and trustees. Notwithstanding anything which has been hereinbefore bequeathed and ordered, I do hereby leave and bequeath to the eldest legitimate son, and other sons in succession, if any, of ———, [meant as *A. H. East*, deceased, and therefore cancelled], all the property bequeathed in Number 1, next after the decease of ———, and then and afterwards to ———, &c., as before willed and left in every respect; but this only in case the eldest son of ———, and other sons, shall rigidly and strictly adhere to the conditions required and herein stated; if not, it will proceed to ———, on the decease of *K.*, as before set down.

The next branch of the first part of the will was headed "Number 1," and was as follows:—"At my decease, I, *Gilbert East*, leave the appropriation of all dividends arising from Bank Stock, 95,995*l.* 2*s.* 8*d.* Old South Sea Annuities; 7000*l.* New South Sea Annuities; 7000*l.* £5 per Cent., 1797; or any other stock standing in my name, whether foreign or British, be the same more or less, to *K.* for her natural life;

and afterwards, I request *R. (a)*, and his heirs, &c., and *S. (b)*, and his heirs, &c., who, I flatter myself, will take on themselves the trouble to act as my executors and trustees in this my will, to proceed directly to lay out, in one or more freehold estates, but one is more congenial, if practicable, with my wishes, all the above recited stocks, [describing the nature of the estates desired to be purchased]. All dividends accruing from the said stocks, on and after the decease of *K.*, shall, as they become due, be again vested in Bank Stock, until the aforesaid estate be purchased, and form part of the purchase-money; and it is my will and direction, that, if all (except what may be hereafter excepted) the stocks be not laid out in land, as aforesaid, within eighteen calendar months next after the decease of *K.*, or of my decease (if she shall die first), then I will and direct that all the property set forth in this Number 1 do go to the next to inherit, as is hereinbefore particularly and clearly set forth: and in case of a further non-compliance, the property set forth in this Number 1 shall go on to every person designated (whether born or unborn) in the former part of this will to the end of the entail, allowing eighteen calendar months to each successive individual, to vest the stocks in land,

(a) *Samuel Twyford.*

(b) *Samuel Girdlestone.*

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son (a), *Austen v. Taylor* (b), *Mellish v. Mellish* (c), *Doe d. Phipps v. Mulgrave* (d), *Byfield's case* (e), *King v. Mellish* (f), *Milliner v. Robinson* (g).

(a) 2 Ves. 225; *S. C.*, 1 Burr. 38, nom. *Robinson v. Hicks*, 3 Bro. P. C. 180.

(b) Amb. 376.

(c) 2 B. & C. 520.

(d) 5 T. R. 320.

(e) 43 Eliz.; Cited 3 Atk. 737.

(f) 1 Vent. 225, 231.

(g) Fra. Moore, 682.

and commencing from his taking possession thereof. It is my will and direction, that the succession of and inheritance to all the property set forth in this Number 1, at the decease of each person, as it may happen, in possession, shall be in every respect and way the same as in the case of non-compliance with the conditions herein stated; and which, I suppose, to be so clearly and explicitly set down, as not to require repetition here. The more usual way in wills is to invest the trustees with the property, who are then directed how to appropriate it. I have not followed this custom, but consider the plan I have pursued equally as legal, and perhaps more intelligible. Every person, on taking possession of the property bequeathed in this Number 1, shall drop every other name save and except that of *Gilbert East* only, and take the arms, motto, and crest of my family, which are affixed to the bottom or foot of this page, under the penalty of the whole of this property in Number 1 bequeathed going to the next to inherit, as before set

down, and to the end of the entail, in case of non-compliance of the individual next claiming possession of Number 1 property.

At page 13 of the book, the will proceeds to deal with the property Number 2,—the *Fyfield* estate. After mentioning the particulars of that estate, the will proceeds thus:—"This possession I leave and bequeath (if mine at my decease) to *K.* for life, and then to *O.* for life, and then to his eldest legitimate son, and afterwards to his other sons, if the eldest have no issue male; it being my will and intention, in this as well as in the cases set down in Number 1, that a grandson legitimate shall inherit before a younger son. If *O.* shall die without issue male, then I leave the above-named estate at *Fyfield* to *N.* (h) for his life, and then to his eldest son, exactly the same as in the foregoing case; and in case here of no male issue, then I bequeath this estate above-named to *M.* for life only, and then, precisely as before directed, to his eldest and other sons, after the eldest, if the

(h) The eldest son of *Richard Rue Clayton*.

Mr. *Malins* and Mr. *Kent* for *Gilbert East*, the infant son of the Plaintiff.

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last have no son, in the case here of no issue male, the *Fifield* possession shall go to *Q.* and his eldest son, and afterwards to other sons as before recited; and in case of failure of male issue here again, I then, and in that case, leave this *Fifield* estate to *W. (a)* for his life, and then to his eldest son legitimate, and afterwards to his other sons in succession of primogeniture, if the eldest have no issue male; it being my wish and desire that this said estate shall not be sold, which, as it cannot be done without suffering a recovery, and that only under certain contingencies, I have endeavoured all in my power to prevent, and do hereby mean fully to express my disapprobation of its being sold, on any legal contingency occurring. I do hereby declare, that it is my intention that no timber shall be cut on any of my estates save only for necessary repairs, and ornamental timber not even for that purpose. The executors and their heirs are requested particularly to attend to this."

The will then disposed of the furniture and live stock at *Fifield*, and made provision for the maintenance of dogs, &c., and other animals belonging to the testator, for whose maintenance some weekly and other payments were directed to be made by the person who should be in

possession of the property bequeathed in Number 1. It then directed that the monies left at the testator's bankers should first be applied to his debts and funeral expenses, and then to the payment of legacies; and that whatever sum might be wanting to complete the entire payment of the whole, should be raised from the dividends of the testator's different stocks that should be received after his decease, until they all were paid; and that all legacy duty should be paid by his residuary legatee; and it appointed the person first entitled to receive the property set down and detailed in Number 1 to be the residuary legatee. It then gave legacies to servants, and proceeded thus:—

"I leave all my specimens of natural history to the person in possession of the property set down and bequeathed in Number 1, except what I may elsewhere leave. I leave all my fire-arms to the person in possession of Number 1 property, excepting what I may hereafter except. I leave the following pictures, drawings, and prints, set down to the persons hereinafter mentioned. All the rest I leave to the individual actually in possession of the property set down and bequeathed in Number 1, and to go as heir-looms, to be inherited by each one in succession,

(a) The eldest son of *John Lloyd Clayton*.

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*Mr. Bethell and Mr. Wickens for Henry Hugh O'Donel Clayton (a), the second son of William Robert Clayton; and*

(a) The person indicated by the letter M. on the card. The *Vice-Chancellor*, on hearing the counsel for this party, said, that it was not to be drawn into a precedent, or to be considered as necessary or proper to make parties to a suit, in such a case, any person claiming an interest be-

hind a tenant in tail. It was suggested, as a reason in this case, that the first Defendant was the infant son of the Plaintiff, and that it might be open to all to contend, that the parties before him in the limitations took successive life estates.

as hereinbefore particularly described as to succeed to the property bequeathed in Number 1. I leave all my plate and plated articles, excepting only those which shall be hereafter bequeathed, to the individual actually in possession of the property bequeathed in Number 1, and to go as heir-looms according with the succession hereinbefore particularly described. I leave all my books, excepting only such as may be hereafter bequeathed, to go to the person actually in possession of the property set forth in Number 1, and to be deemed heir-looms."

Other legacies are then given, and all the testator's goods and chattels, (save only those bequeathed), are left to the person who shall possess the property set forth in Number 1 as heir-looms. There are then some other legacies, and amongst them the following:—"I leave unto each of my nephews, that is, sons of my sister *Mary Clayton*, after

the decease of my wife *Eleanor Mary East*, all and except the one first to inherit, if any, my property set down at Number 7 of this book (b), 1000*l.* each."

These provisions are followed by some directions as to the testator's funeral, and by a direction for the reservation of an annual sum from the proceeds or rent of the great tithes of *Witham*, to keep in repair the vault, church, tombs, &c., the person in possession of the property set down in Number 1 to have the direction and ordering of the repairs. And the will, so far as it is under the date of January 10, 1819, terminates with the gift of some further legacies.

The will commences again under the date of the 4th of December, 1819, as follows:—"Whereas, by the decease of my father, Sir *William East*, which occurred on October 12th, 1819, and by my right to inherit all his freehold lands unbequeathed,

(b) Meaning, undoubtedly, No. 1, at p. 7.

Mr. *Campbell* for the eldest son of the last-named Defendant, argued, that the Plaintiff took an estate for life only, and

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the following lands belong to me, and are in my power to dispose of them, and I do hereby dispose of them as follows: to wit, that they do go to the person successively described in Number 1, and at page 7, and on the same terms and injunctions in every respect as have been hereinbefore particularly set down. [Then follows a description of the lands.]

Under date of 11th of January, 1820, the will proceeds: "I, *Gilbert East*, finding an omission in the foregoing pages of this my last will and testament, do here correct the same, scil., That any legitimate issue I may have, either male or female, shall inherit, next after *K.*, and before *L.* and all the rest, all my property set forth in Numbers 1 and 2, and pages 7 and 13 of this will, as follows: I leave these properties aforesaid to my eldest son, and all other my sons in order of primogeniture, provided my eldest son have no issue male, and hereby entail them in my family to the utmost extent the laws of *England* will admit; but in failure of issue male to me, I leave all the properties aforesaid, bequeathed in Numbers 1 and 2, and in pages 7 and 13 of this book, to my eldest daughter, and other daughters after her in order of primogeniture, and to their heirs male, provided, but not else, that each one do bear the name of *Gilbert East*, using no other name, and also

bearing my armorial devices as hereinbefore set forth; and if these injunctions be not strictly complied with, I then leave these properties set forth in Numbers 1 and 2, and in pages 7 and 13, and before rehearsed, to go as hereinbefore particularly set down and bequeathed, and which will be the succession of inheritance on failure of issue male and female to me. At my son coming to the age of twenty-one years, I hereby order, shall be allowed any sum not less than 500*l.* per annum; and on his marriage with his guardians' approbation, 500*l.* more per annum; each of my daughters shall be paid on their marriage with their guardians' consent, or on arriving at twenty-one years of age, 10,000*l.* sterling; each one to be paid from the properties set down in Number 1, and at page 7. The allowances also to my son shall be paid from the same source. All my younger sons shall be paid on their coming of age 10,000*l.* sterling each, from the properties set down in Number 1 and at page 7."

There then follows a number of detached passages of the will, without date, applying to different subjects. So far as they are material they are as follows: (P. 38.) "It is hereby my order and direction, that any legitimate issue of mine who may have a right to inherit my properties set down in Number 1 and page 7, and Number 2 and page 13, shall in

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cited *Hodgson v. Ambrose* (a), *Malcolm v. Taylor* (b), *Meure v. Meure* (c), *Baskerville v. Baskerville* (d), *Houston v*

(a) *Fearne's Conting. Rem.*, 7th edit., 174.

(b) 2 Russ. & My. 416.

(c) 2 Atk. 265.

(d) *Id.* 279, 281.

every respect be liable to the penalties of all and every refusal to comply with the injunctions and orders hereinbefore set down and directed, and those which may be hereafter ordered. And whereas I hold of my father, Sir *William East*, Bart., certain leasehold estates, held on lives, the same being entailed, and with an injunction that the holder of them shall renew such lives whenever they shall drop or cease: Now I do, in furtherance of such his order, hereby enforce the same as my express will and pleasure, and request my executors and trustees from time to time to see the same enforced; and moreover, that they will enforce the renewal of any leasehold estates held for a term of years, that I may be possessed of, either as an inheritance from my father Sir *William East*, or being mine by any other means; and this latter injunction shall be in force as to any leasehold estates held on lives that I may be possessed of by any purchase, bequest, or any other means." \* \* (P. 40.) "And whereas, by error or inadvertence in the will of my late father Sir *William East*, there may be a possibility, that, under certain contingencies, the great tithes of *Witham* in *Essex*, held for many years on a lease of three lives by my family, under

the Bishop of *London*, and the church containing the burial-vault of my family, may be, I say, sold to fulfil certain bequests &c. in the will of my late father aforesaid: Now my will is, that if the contingencies aforesaid for the necessity of sale shall ever occur, and that the person in actual possession of my property set forth in Number 1 does not purchase the lease of the great tithes of *Witham* aforesaid, that then all the property set forth in Number 1 shall go to the next to succeed to this property last mentioned; and shall further go on throughout the whole entail, till one person be found to comply with this so proper and reasonable request; and if no one in the entail hereinbefore so particularly rehearsed, shall be willing to comply with this order of purchase of the lease of the great tithes of *Witham*, then the whole property set forth in Number 1 shall be vested in my almshouse, which may then be extended every way twenty fold or more. Any guardian or trustee, if the necessity of sale shall occur during the nonage of any person inheriting the property aforesaid, shall have power to purchase the lease of the great tithes of *Witham* aforesaid for such minor, either male or female, being then entitled to the property afore-

*Hughes (a), Lewis v. Waters (b)*; on the construction of the will, with reference to the question of the extent of the

(a) 5 Russ. 116.

(b) 6 East, 336.

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said. Now when the lease of these great tithes of *Witham* shall have been purchased as before described, I hereby will and direct, that they form part of the entail in every way and respect, as the other property set down in Number 1 and page 7." [The will then provides for 7000*l.* Old South Sea Annuities, part of the property described in Number 1 being reserved to meet this purchase, and for the residue of the purchase-money to be paid from the proceeds of the Bank and other stocks, or from the rents of land purchased therewith; the person in actual possession nevertheless appropriating the dividends of the Old South Sea Annuities.] The testator then proceeds: "In like manner, and for reasons similar to those described above, I order and direct, that if ever it should so happen that *Hall Place*, either alone, or together with lands left to me for life only by my father, and being &c., [describing them] shall be about to be sold, they shall also be purchased by the individual in possession, or trustees &c. for such individual;" with the same provisions in case of non-compliance, and for the property when purchased becoming part of the property bequeathed in Number 1 and page 7, as he has before made respecting the leasehold tithes; the purchase-money to be provided from the sale of lands purchased with the stocks comprised

in Number 1, or from the stocks themselves; and the testator then adds: "I wish here to admonish and entreat my executors and trustees, and their heirs, &c., that they will truly and lawfully put in execution all and every one of these orders and directions set down by me in this my will and testament, and likewise to observe, that, if any omission which the subtlety of the law may endeavour to elicit, or its jealousy at a man making his own will may prompt, that such omissions and mistakes may be adjusted on a liberal, gentlemanly, or equitable basis, discarding the frequently miserable quirks of the law as beneath the notice of gentlemen, who are so good as to put in execution the will of a person, who, though he may be said to possess eccentricities, yet he is sure possesses an honest and honourable mind."

The next of these clauses provides for the repairs of *Hall Place*, directing it to be kept in repair by the person in actual possession thereof in virtue of the will; and that the general fixtures and fashion of the house and grounds be observed, on penalty of forfeiture to the next heir. At page 48, the will proceeds: "I have inherited by entail certain farms in the county of *Suffolk*, [enumerating them] together with two freehold houses in *Bow Street*, and in *Rue-*

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estate thereby given to the Plaintiff, *Evans* dem. *Brooke*  
*v. Astley* (a), *Lord Glenorchy v. Bosville* (b), 1 Rolle's Abr.

(a) 1 W. Bl. 521.

(b) Ca. temp. Talb. 3.

*sell Street Covent-garden*, and one leasehold house in *Carey-street*. Now, having by a legal process a power vested in me of disposing of this property aforesaid by will, I do accordingly bequeath it as follows: First to *K.*, and then to *M.*, and afterwards to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male if he have, it will go to him, and so on to the other sons in like manner. After the decease of *K.*, I repeat, I bequeath all the property aforesaid to *M.*, and his heirs male, in the manner aforesaid, as in the case of *L. &c.*, at page 2; and I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions; and again, on failure of issue male legitimate, I bequeath all the property aforesaid to *O.* and his heirs male; and next to *L.*; all under the same rules and injunctions in every respect; and next to *W.* and his heirs male legitimate; and then to *Q.*, provided, and not else, that he do assume my name and arms, as is directed particularly at page 11 of this my will, and then to his sons in order of primogeniture, who shall also take my name and arms, as before directed, respectively; but neither *Q.* or any of his issue shall assume any other names than those set down at page 11 of this will, or use other

heraldry; if they do, they shall not inherit this property."

Another of the clauses (p. 50) relates to property in London, and is as follows:—"Any house in London, that is, which I occupy and reside in, whether my own by purchase or held on lease or in any other way, that may be in my occupation at the time of my decease, I hereby bequeath to *K.*, to dispose of as ——— may think fit; but if ——— should die before me, I then bequeath the house and appurtenances aforesaid to *M.*, to dispose of as ——— may think fit; and if ——— should die before me, then and in that case I leave it to *N.*, with this distinction, that it be settled on their heirs male."

Other clauses related to estates which appeared to have been purchased from time to time, and which were left, as to one of them, to go with the property described and set down in Number 1 and at page 7, and upon the same terms and conditions in every particular as were thereinbefore set forth; and as to another of them, "to the person who will inherit, as by this will is ordered, all my property set down and described at Number 1, and to go with it in entail, as is there fully described;" and as to a third, "to go precisely and exactly as is set down and ordered in entail at Number 1."



p. 857, tit. *Estate taylor per devise*, pl. 13; and on the question whether the limitations were not executory, *Green v. Stephens* (a), *White v. Carter* (b), *Willis v. Hiscox* (c), *Bagshaw v. Spencer* (d), *Leonard v. Lord Sussex* (e), *Papillon v. Voice* (f), *Harrison v. Naylor* (g).

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Mr. Rennals for the trustees.

VICE-CHANCELLOR:—

This is a question arising upon the construction of one of the most singular wills which the Courts of justice in this country have ever had to deal with. Sir *Gilbert East*, the testator in this cause, had a large property, consisting in part of money in the funds, an estate in *Berkshire* called

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- (a) 17 Ves. 64, 76.  
(b) 2 Eden, 363; *S. C.*, Amb. 670.  
(c) 4 My. & Cr. 197.  
(d) *Fearne's Conting. Rem.* 121,

139.  
(e) 2 Vern. 526.  
(f) 2 P. Wms. 471.  
(g) 2 Cox, 247.

At page 54 of the book, was as follows:—

"Authentic and valid succession of property in this my will set down at Number 1 and page 7 of this book, marked \* [this corresponds with the card \*]. The eldest and other sons to inherit before the next letter:—

First to *K.*,  
Then to —,  
Then to *L.*,  
Then to *M.*,  
Then to *N.*,  
Then to *O.*,  
Then to *P.*,  
Then to *Q.*,  
Then to *V.*

Succession of property in this

my will set down at Number 2 and page 13 of this book, marked \* *Fifield*:—

First to *K.*,  
Then to *O.*,  
Then to *N.*,  
Then to *M.*,  
Then to *Q. Q.*,  
Then to *W.*

Succession of property in this my will set down at page 46 of this book, marked \* *Suffolk*.

First to *K.*,  
Then to *M.*,  
Then to *O.*,  
Then to *L.*,  
Then to *W.*,  
Then to *Q.*

Witness my hand,

*Gilbert East.*"

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the *Fifield* estate, an estate in *Suffolk*, and pictures, books, and furniture; and, in part, of other particulars, which it is not important to enumerate, as the dispositions of them generally follow the dispositions of the property which I have mentioned. He has made this will in a book, in which the several dispositions of his property are for the most part designated by different letters; and the book refers to a card, upon which the names of the persons intended to be designated by the different letters are set down. He has classed the principal part of the property disposed of by the will under three principal heads: The first, which stands under the head No. 1, relates to his funded property. The second, which is under the head No. 2, relates to the *Fifield* estate; and the third relates to the *Suffolk* estate. He has directed the property comprised in No. 1,—the funded property,—to be laid out in the purchase of freehold estates. In pursuance of these directions, some estates have been purchased and conveyed to the trustees of the will. The question in this cause is, whether, according to the true construction of the will, the Plaintiff *Gilbert East* became entitled to these estates as tenant in tail male, and whether he has become entitled absolutely to some heir-looms which are directed by the will to follow the dispositions of those estates. It has been already determined, that the will was void as to the testator's real estates (a); and that, upon the death of the testator, *Lady East* became entitled for her life to the income of the property comprised in No. 1; and that, upon her death in 1838, the Plaintiff became entitled to the income of that property, and entitled also to the possession of the heir-looms. And the testator having by his will directed that the legacy duty should be paid out of his residuary estate, it has been held by the Court of Exchequer, in a suit against the executor for the recovery of the

(a) See *Clayton v. Lord Nugent*, 13 M. & W. 200, where a considerable portion of the will is stated.

duty, that the plaintiff took an estate in tail male in the lands to be purchased with the funded property, and that the duty was payable upon that footing (a); and it has accordingly been paid out of funds in this Court, without prejudice to the question to be determined in this cause.

[His Honour stated the material parts of the will. See pp. 713 et seq. in notis.]

The testator died on the 11th of December, 1828. It appears that the persons designated by the letters *N.* and *O.* were not then in existence: neither *Richard Rice Clayton* nor *Augustus Philip Clayton*, whose eldest sons were the persons so designated, having then been married.

The question first to be considered in this case must be, whether, under the limitations of this will, the Plaintiff takes an estate in tail male in the lands purchased with the proceeds of the property comprised in No. 1; for the Plaintiff's title depends wholly upon that question. The question is no doubt one upon which the Court would be well warranted in taking the opinion of a Court of law; but the parties have desired that I would give my opinion upon it: and I shall not hesitate to do so, it being clear that the Court has power to decide the question, and my opinion being, that, wherever the parties do not desire it, the Court ought not to send, for the opinion of other Courts, questions which it has itself power to decide, and which can fairly be decided without calling for such assistance (b). I am the more disposed to take upon myself the decision of this question, as, if my decision be in favour of the Plaintiff, it will be in conformity with the opinion already given at law; and, if it be against the Plaintiff, it will affect more immediately his interest, and it is at his instance I abstain from sending the case for the opinion of a Court of law.

(a) Vide *infra*, p. 730, n.

(b) See *Falkner v. Grace*, su-

pra, p. 280. And see 15 & 16 Vict.

c. 86, s. 61.

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The question has been argued upon the terms of the will, taken in connection with the cases bearing upon the construction to be put upon the word "son," and I propose to deal with it accordingly. That this testator intended to create and has created an entail in the lands to be purchased with the property in question, no reasonable doubt can, I think, be entertained. Every clause in the will teems with expressions of that intention; but we have advanced only a little way in the case when that intention is ascertained. The question still remains, in whom he intended the estate tail to be vested, whether in *L.* or in his sons. In order to determine this question, it is necessary, I think, in the first place, to ascertain what are the precise limitations of the estate in favour of *L.* and of his sons. The direct limitations of the will in their favour throw but little light upon this question. There is no mention either of *L.* or of his sons in those parts of the will which relate to No. 1 and No. 2, except in the equivocal expression "if not to *L.*," which is found in the series of limitations applicable to the property comprised in No. 1, and which may either mean, if the testator does not afterwards leave the property to *L.*, or if *L.* does not comply with the conditions of the will. There is no mention of *L.* or of his sons in the other parts of the will anterior to the "authentic succession," except in the expression "as in case of *L.*," which is found in the disposition of the *Suffolk* property, and which merely connects the dispositions in his favour with the dispositions in favour of others; and although the "authentic succession" tells us, that *L.* is to take, and that his eldest and other sons are to inherit before the next taker, it is wholly silent as to the estate to be taken by *L.* and by his sons. This is left to be discovered from some other parts of the will; and, referring to the devise of the *Suffolk* estate, we find that it is given "to *M.*, and afterwards to his eldest legitimate son, and then to his other legitimate sons "in order of primogeniture, provided, but not else, the "eldest have no issue male. If he have, it will go to him,

"and so on to the other sons in like manner after the de-  
 "cease of *K*. I repeat," he adds, "I bequeath all the pro-  
 "perty aforesaid to *M*. and his heirs male, in manner afore-  
 "said, as in the case of *L*., &c., at page 2" (a), thus creat-  
 ing a series of limitations in favour of *M*. and his issue  
 male, which, if grandsons be read issue male, corresponds  
 with the limitations in favour of *M*., his sons and grand-  
 sons, contained in the limitations of the property No. 1, set  
 forth in the early part of the will. The expression in the  
 one case,—the disposition of the *Suffolk* property being  
 "to *M*. and afterwards to his eldest legitimate son, and  
 "then to his other legitimate sons in order of primogeni-  
 "ture, provided, but not else, the eldest have no issue  
 "male;" and in the other,—the disposition of the property  
 comprised in No. 1 being "to *M*. and afterwards to his  
 "eldest lawfully begotten son, &c.," with a further direc-  
 tion, that, in case of the decease of an eldest son, the pro-  
 perty shall go to the second legitimate son, and so on ac-  
 cording with primogeniture, but that "in every case a  
 "grandson shall inherit before the next named in the en-  
 "tail" (b). From this connection of *L*. and *M*., and this  
 correspondence of the limitations, I think it clear that  
 these are the limitations which this testator intended to  
 take effect in favour of *L*., his sons and grandsons.

But it may be said, that the difficulty is not yet re-  
 moved. We have yet to discover what is the meaning of  
 the word "afterwards" to *L*. or *M*., and "afterwards to his  
 eldest lawfully begotten son," and so on. Does it mean,  
 that the sons are to take the same estate as *L*. had before  
 taken? or does it mean that the sons are to take after the  
 death of *L*.? The word "afterwards" occurs very fre-  
 quently in this will; and it is not easy to find any passage  
 which unequivocally expresses its meaning; but I find it  
 used in No. 1, where the testator gives that property to *K*.

(a) Page 47 of the book containing the will. (b) *Supra*, p. 714, n.

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for life, and afterwards requests *R.* and *S.* to lay it out in the purchase of lands; and it is clear that, in this passage, it can only mean after the death of *K.* I think it has the same meaning throughout this will; and that the limitations in question are therefore to be read thus:—To *L.* for life; and, after his decease, to his eldest son, and then to his other sons in order of primogeniture, provided his eldest son have no issue male, according to the terms used in the disposition of the *Suffolk* property: or, to *L.* for life; and, after his decease, to his eldest son; and in case of the decease of the eldest son, to his second son, and so on in order of primogeniture; but with a proviso, that, in every case, a grandson shall inherit before the next named in the entail, according to the terms used in the disposition of the property comprised in No. 1.

The conclusion to be drawn from these limitations appears to me to be, that this testator did not regard *L.* as the stock or stirps, but looked to the sons of *L.* as the parties from whom the property was to devolve in succession: and I think that the context of the will supports this conclusion; for not only do we find the default of issue male of the eldest son mentioned in the limitations of the *Suffolk* property as the preliminary to the succession of the younger sons, and also find the remarkable correspondence between issue male and grandsons, to which I have already referred, in the limitations of that property, and of the property comprised in No. 1; but throughout this will, when limitations are made in favour of sons, it is expressly provided that they shall take in order of primogeniture; and there is no such provision as to grandsons;—which, I think, indicate that the sons were intended to take by particular description, but the grandsons as a class.

It was said, indeed, that it was sufficient to construe

the word "son" to be a word of purchase, and the word "grandson" to be a word of limitation; but this argument rests upon a technical basis; and this will must not, I think, be looked at with a technical eye. We are searching for the intention of the testator; and if the testator has used expressions which indicate that he intended the sons to take by purchase, and the grandsons by limitation, his intention is not the less apparent because it may be open to technical difficulties. It was said again, that the testator intended each successive taker to take the whole estate; but the testator has, in several cases, limited life estates, and has, therefore, shewn that he knew how to limit such estates when he intended to do so; and for the reasons I have already given, I think that he intended to give a life estate only to *L*.

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It was also said, that if the will were construed to give only a life estate to *L*., it must equally be construed to give life estates only to *N*. and *O*.; and that then the intention of the testator in favour of their issue male would be defeated, they not having been born in the testator's lifetime; but I think that the testator's intention would here be aided by the cy-pres doctrine, and that the case would, in this respect, be governed by *Vanderplank v. King* (a).

Intention to give life estates to persons not born in the lifetime of the testator aided, so far as the law will allow, by the cy-pres doctrine.

Reliance was also placed on the use of the word "inherit," and upon the difficulties which would arise from lapse by the death of a grandson in the life-time of the testator; but I think that the word "inherit" is, in this will, for the most part, if not wholly, used in the sense of succession by descent; and the argument upon lapse was well answered, by pointing out the lapse which would occur by the death of *L*. himself, if the estate tail was held to be in him. Upon the whole, therefore, I have, though

"Inherit" construed in the sense of succession by descent.

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The authorities which establish that a son or sons may be construed as a word of limitation, to effectuate the intention of a testator, do not therefore or necessarily lay down any rule by which the Court can be guided in determining upon such intention.

The question is, whether "son" or "sons" be used as nomen collectivum; upon which a subsequent limitation in favour of grandsons has an important bearing.

certainly not without difficulty, arrived at the conclusion, that, upon the sound construction of this will, the intention of the testator was that *L.* should take for life only.

Do, then, the authorities prevent me from putting this construction upon the will? They appear to me to establish no more than this, that the word "son" or "sons" may be construed as a word of limitation to effectuate the intention of a testator. They do not, and, indeed, it could hardly be expected that they should, lay down any rule by which the Court can be guided in determining upon the intention. The true question upon all the cases is, whether the expression "son" or "sons" is used as nomen collectivum; and any subsequent limitations in favour of a grandson or grandsons must, I think, have a very important bearing upon this question. Why do we find the subsequent limitations to the grandson or grandsons, if the term son or sons was used as nomen collectivum? Would not the term son or sons, if used in that sense, of itself include the grandson or grandsons, without further mention of them? This case seems to me to stand unaffected by the authorities, with the exception of the decision of the Court of Exchequer upon the will itself (*a*). I have al-

(*a*) The reporter has obtained a short-hand writer's note of the judgment pronounced by the Court of Exchequer, June 27th, 1849, which is as follows:—

"We reserved our judgment on one point only, namely, whether *Gilbert East Clayton*, designated in the will of the late Sir *Gilbert East* by the letter *L.*, was entitled under that will to an estate of inheritance in the lands directed to be purchased with the produce of the Bank stock and other funds, or only to an estate for life? On this point

we took time to consider, rather because, in the case of so strange a document as this will, it is difficult to follow all its provisions without an opportunity of reading more attentively than can be done during an argument, than from any doubt we entertained as to what our judgment must be. We have now had an opportunity of considering the will more at leisure, and we are clearly of opinion that *L.* took an estate in tail male in the land to be purchased, and not an estate for life only.



ready adverted to, and stated my views upon, one or two of the points on which that judgment was founded. It is

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"The interests of the several objects of the testator's bounty are to be ascertained mainly from the language of the early part of the will, coupled with page 54, and explained by the card.

"From the several passages, it is plain, that, after the death of the testator's widow in 1838, *Gilbert East Clayton* became entitled for some estate and interest in the lands to be purchased, and the question is, what estate and interest he took in them. Now, it appears to us clear that *L. M. N. O. P. Q. and V.* were all intended to take the same quantity of estate, for they are all bracketed as it were together at page 54, and are there designated as the persons who are to take the property in succession, with a marginal note stating that the eldest and other sons are to inherit before the next letter.

"This must have precisely the same effect as if the testator had in words directed that the lands to be bought should be held and enjoyed by *L., Gilbert East Clayton*, and at his death by his eldest and other sons, and for default of such sons then by *M.*, and his eldest and other sons, and so on through the whole line indicated at page 54. Even if there had been nothing more than this, we think it would have been plain that each party in succession must take an estate in tail male. The word sons, as there used, is clearly nomen collectivum, and make the estate of

the devisee an estate in tail male, according to the doctrine acted on in *Robinson v. Robinson*, and followed in very many later decisions; and the case is made even more plain by the circumstance, that two of the devisees who were to take in succession, namely, those indicated by the letters *N. and O.*, were not in esse at the date of the will, so that at that time no remainders could have been limited on an estate for life given to them.

"It might be sufficient to stop here and rest our judgment exclusively on the provisions at page 54; but it may be right to add, that the other passages in the will tending to throw light on the subject, all confirm, instead of impeaching the construction we adopt. The strict way in which the testator at page 1 forbids any person claiming under him from suffering a recovery, or otherwise overturning the limitations he had created, tends to shew that the estates he was creating were such as he knew might be defeated by a recovery, if his wishes were disregarded by his devisees.

"In page 2, he in effect says, that, at the decease of each successive devisee, the estate shall go to his eldest legitimate son &c., clearly shewing by the "&c." if there were any doubt on the matter, that under the word son he meant to designate male issue generally. These words are not, it is true, in terms applied to *L.*, but

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further rested upon the ground that the testator has directed that the lands to be bought should be held by *L.*, and at his decease by his eldest and other sons, and, for default of such sons, by *M.* and his eldest and other sons, and so on, and has also directed, that, at the decease of each successive taker, the estate shall go to his eldest legitimate son, and the "&c.," being taken to shew, that, under the word son, the testator meant to designate male issue generally,—upon the prohibition against suffering a recovery, and upon a supposed obligation on the devisees to abstain from violating that prohibition. But it is to be observed, with reference to the limitations, that the Court, in the construction put upon them, seems to have lost sight of the limitations to the grandsons, on which, as I think, the

only to those who were to come after *L.*; but though not expressed in terms, it is plain from the context, the testator understood that *L.* was to take the same estate as those who were to come after him, so that the words son &c. are applicable to him as well as to the others.

"Again, at page 3 the testator directs, that, in case of the decease of an eldest son in any of the above cases, the property shall go to the second legitimate son, and so on; but in every case a grandson shall inherit before the next named in the entail. What is this but an inartificial way of saying that the devisees shall take estates in tail male.

"It is true that all those devisees are coupled with directions, that every devisee should abstain from cutting off the entail, and bind himself so to do. But this is an illegal restriction, not tolerated by the law. It is

in effect directing that the estate shall go in the same course of succession in which it would go if given to the different devisees as tenants in tail male; but yet, that each taker in succession should be tenant for life only. In such a case, according to well recognised rules of law, the parties take estates in tail male, the general prevailing over the particular intention.

"The *Solicitor-General*, in his argument before us, pointed out several other passages, all more or less leading to the same conclusion as that at which we have arrived; but it is unnecessary to advert to them, the points already noticed being amply sufficient to shew all which we are called on to decide, namely, that *Gilbert East Clayton* took an estate in tail male; and so that on this record there must be judgment for the Crown for the sum of 9600*l.* due for legacy duty."

whole question depends. And with reference to the prohibition, and the supposed obligation for enforcing it, I think that the prohibition does not necessarily apply to all the devisees; and that it may well be construed to apply to such of them only as would have power to bar the entail by recovery; and beyond the prohibition I do not find any obligation imposed upon any of the devisees not to suffer a recovery. There is no such condition in No. 1, which contains the other conditions attaching upon the estates of the devisees.

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---

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The prohibition against suffering a recovery, construed to apply only to such of the devisees as would have power to bar the entail.

I am therefore compelled most respectfully, and I may add most reluctantly, to dissent from the opinion of the Court of Exchequer, and to declare my opinion to be, that *L.*, the Plaintiff in this case, takes for life only.

This being my opinion upon the construction of the will, it is unnecessary for me to give any opinion upon the question of executory trust; and I think it better to abstain from doing so. I take it to be well settled, that a trust is not executory in the sense which the Court attaches to the word, merely because a conveyance is to be made; and unnecessary discussions upon the subject are calculated to raise questions which are better left at rest. My opinion being, that the Plaintiff is tenant for life only, the bill must be dismissed.

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March 2nd,  
3rd, 12th, &  
18th.

A purchaser having notice that another person, or his under-tenant, is in possession of the property, is not justified in presuming the possession of that person to be the possession of the vendor; but is bound to make inquiries of the person who, by himself or his under-tenant, is so in possession, or he will be deemed to have notice of the title of such person.

BAILEY v. RICHARDSON.

**J**AMES COCKER, being the owner of properties at *Leeds*, which may be designated as Lots 1, 2, and 3, on the 11th of October, 1828, conveyed the legal estate in fee in Lot 2 to *Jackson*, by way of mortgage, for securing the sum of 800*l*. He afterwards mortgaged all the properties, Lots 1, 2, and 3, first, on the 22nd of October, 1835, to *Marsden*, for 1950*l*.; secondly, on the 18th of June, 1836, to *Muson* and *Richardson*, for indemnifying them to the extent of 2000*l*. against liabilities they had undertaken on his account; and thirdly, on the 6th of November, 1838, to *Bailey* for 800*l*. In the mortgage to *Bailey*, parts of the premises were described as being then in the occupation of *Richardson* and his under-tenants. *Cocker* afterwards became bankrupt; and *Richardson*, in whom the security created by the deed of the 18th of June, 1836, and on which 1000*l*. was represented to have been then due, had become vested, purchased the equity of redemption from the assignees of *Cocker*, and took a conveyance of it, on the 13th of July, 1836, to *Thomas Cope*, in trust for himself, reciting in the conveyance that *Richardson* was desirous of reserving such priority of charge as he had by virtue of the deed of the 18th of June, 1836, and was, for that purpose, desirous that the equity of redemption should be conveyed to *Cope*; and the deed contained a proviso and declaration, that the mortgage security should remain unmerged and available as a protection against all charges, if any such there were on the premises, and of which *Richardson* had actual or constructive notice, or otherwise. Subsequently, by a deed dated the 3rd of April, 1849, *Jackson's* mortgage was transferred to *Bailey*, who thus acquired the legal estate in Lot 2, and also obtained from some trustees, in whom some terms were vested for securing *Bailey's* mortgage, declarations of trust in his favour.

The questions were, first, whether the Plaintiff, as the personal representative of *Bailey*, was entitled to priority over *Richardson*, in consequence of having got in the legal estate in Lot 2, and the declaration of trust of the terms; and, secondly, whether *Richardson*, having purchased the equity of redemption, could set up his mortgage against the Plaintiff.

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Statement.

Mr. *Rolt* and Mr. *Humphry*, for the Plaintiff.

Argument.

Mr. *Stuart* and Mr. *Rogers*, for the Defendant *Richardson*.

Mr. *Kenyon Parker* and Mr. *J. H. Palmer*, for other Defendants.

The cases cited were, first, on the effect of the recital in the conveyance to the Plaintiff of the possession of *Richardson* and his under-tenants: *Allen v. Anthony* (a), *Daniels v. Davison* (b); and secondly, on the effect of the union in the same person of the beneficial interest in the equity of redemption and in the mortgage: *Smith v. Phillips* (c), *Toulmin v. Steere* (d), *Parry v. Wright* (e), *Titley v. Davies* (f), *Forbes v. Moffatt* (g).

VICE-CHANCELLOR:—

I am of opinion, that, the premises being described in *Bailey's* mortgage deed as being in the possession of *Richardson* and his under-tenants, the Plaintiff is not entitled to the priority which he has claimed. I think the

Judgment.

(a) 1 Mer. 282.

(b) 16 Ves. 249.

(c) 1 Keen, 694.

(d) 3 Mer. 210.

(e) 5 Russ. 142; *S. C.*, 1 S. & S. 369.

(f) 2 Y. & C. C. C. 399, n.

(g) 18 Ves. 384.

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*Judgment.*

case in this respect is governed by the decision in *Daniels v. Davison* (a). An attempt was made to distinguish that case, upon the ground, that the premises were there described as being in the occupation of *Daniels*; but that, in the present case, they are described as being in the occupation of *Richardson* and his under-tenants. But I think the distinction cannot be maintained. The principle of *Daniels v. Davison* is, that a purchaser, having notice that another person is in possession, is not justified in assuming the possession of that person to be the possession of the vendor, but is bound to make inquiry of the person in possession; and that principle reaches the present case, whether the possession was in *Richardson* or his under-tenants.

Mortgagee purchasing an equity of redemption, preserves his mortgage unmerged by taking a conveyance to a trustee, with a declaration of his intention to that effect.

I am also of opinion, that *Richardson*, notwithstanding his purchase of the equity of redemption, is entitled to set up his mortgage against the Plaintiff, the mortgage having been kept alive notwithstanding the purchase.

The Plaintiff having set up a claim to priority which he cannot maintain, must pay the costs of the affidavits, so far as they relate to the question of priority. In other respects, there must be the usual decree for foreclosure.

(a) 16 Ves. 249.

## FARRER v. BARKER.

**ROBERT FARRER**, by his will, dated in January, 1835, after bequeathing unto his daughter, *Mary*, the wife of *John Kettlewell*, the sum of 2000*l.*, to be paid within twelve months next after his decease, proceeded: "I give and bequeath to the three children now living of my said daughter, *Mary Kettlewell*, the sum of 1000*l.* a-piece, to be paid to them respectively when and as they shall severally attain the age of twenty-one years." And the testator directed, that, from his decease until the said three legacies should become payable, interest thereon at 5*l.* per cent. per annum should be paid to the father or guardian of the respective legatees thereof, to be applied in maintaining, educating, bringing up, and providing for such legatees during their respective minorities. And the testator bequeathed unto trustees therein named the sum of 2000*l.*, to be paid within twelve months next after his decease; and he directed that such sum of 2000*l.* should carry interest from the time of his decease until the same should be raised or paid, at 5*l.* per cent. per annum; and that such interest should be paid and applied in the same manner as the dividends and interest to arise from the said sum of 2000*l.* (after the same had been invested as hereinafter directed,) would be payable and applicable by virtue of his will; and he declared that the said trustee should stand possessed of the said sum of 2000*l.* upon trust to invest the same as therein mentioned, and stand possessed of the interest thereof, and the securities for the same respectively, upon trust to pay the said dividends

1852.

March 22nd  
& 23rd,  
July 6th.

Legacies of 1000*l.* each to the three children then living of *A.*, the testator's daughter, with a proviso for the payment of the interest for their maintenance during minority, and a bequest of 2000*l.* to trustees, upon trust for *A.*, for her life; and from and after her decease, for all and every her children living at her decease, equally to be divided, with a proviso that, if any one or more of the children of *A.* should die under twenty-one, without leaving issue, the original and accrued legacies and shares bequeathed to the child or children so dying should go to the others and other of the said children, equally; and a declaration that, if all the children of *A.* should die under twenty one, and without leaving issue, the legacies of

1000*l.* a piece should not be raiseable; but from and after the decease of the last surviving child, the said legacies,—and from and after the decease of her daughter the 2000*l.*—should sink into the residue:—*Held*, that the rights of the children of *A.* in the legacy of 2000*l.* were contingent upon their surviving their mother.

Some of the reasons which have influenced the Court in decisions in favour of vesting legacies in children, have no application in the case of grandchildren, where there is nothing to shew that the testator had placed himself in loco parentis.

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 ———  
*Statement.*

and interest, when and as the same should become due, to his said daughter during her life, for her separate use; and from and after the decease of his said daughter, the said sum of 2000*l.* should be in trust for all and every the children of his same daughter (living at her decease), equally to be divided between or amongst them, if more than one. And if there should be but one such child, then the whole should be in trust for that one or only child. And he declared and directed, that the share or respective shares of such of the said children as should have attained the age of twenty-one years in the lifetime of their said mother, should be paid or transferred to him, her, or them respectively, as soon as conveniently might be after her decease; and that the share or respective shares of such of the same children as should be under the age of twenty-one years at the time of her decease, should be paid or transferred to him, her, or them respectively, when and as he, she, or they should attain that age, together with the accumulated dividends and interest arising therefrom in the mean time (a).

The testator died in April, 1835. The three children of *Mary Kettlewell*, the daughter, who were mentioned in the will to be then living, were *Robert*, *Mary*, and *Hannah*. *Robert* died in the lifetime of the testator, under age, and without issue. *Mary* (the granddaughter) attained twenty-one, but afterwards died in the lifetime of her mother, without having been married. *Hannah* married *James Meek*, and also attained twenty-one, but afterwards died in the lifetime of her mother, without issue; *Mary Kettlewell*, the mother, never had any other children, and died in October, 1851.

(a) Here followed two clauses in that part of the report only, to which are quoted in the judgment, pp. 741-2, and are stated avoid repetition.



The claim was filed by the executors of *William Farrer* the son, and of *Mary Kettlewell* the daughter of the testator, who were two of his residuary legatees, to have the rights and interests of all parties in the legacy of 2000*l.* declared, and to have one third part thereof paid to the Plaintiffs, the executors of *Mary Kettlewell*, and one other third part to the Plaintiffs, the executors of *William Farrer*.

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Statement.

Mr. *Walker* and Mr. *Robson*, for the residuary legatees, claimed the fund—arguing, first, that there was no gift except to children of the daughter living at her death; and none of the children answered the description: and secondly, that, as some of the children of the daughter attained the age of twenty-one, the gift over in default of that event did not take effect. They contended that the original gift was clear and unambiguous, and that the Court would not reject words of restriction or qualification, unless they were repugnant to the rest of the clause in which they were found.—On the first point, they cited *Bielefeld v. Record* (a), *Tucker v. Harris* (b), *Tawney v. Ward* (c), *La Roche v. Davies* (d), *Bull v. Pritchard* (e), *Hotchkin v. Humfrey* (f), *Bright v. Rows* (g); and on the effect of the gift over, *Ellicombe v. Gompertz* (h), and *Fitzgerald v. Field* (i).

Argument.

Sir *W. P. Wood*, Mr. *C. Barber*, Mr. *Willcock*, and Mr. *Bates*, for the personal representatives of *Hannah* and *Mary*, the granddaughters, contended—that, upon the words of the declaratory clause, applying to the event of the death of the children under twenty-one without issue, and giving over the shares thereinbefore given, it was clear that

(a) 2 Sim. 354.

(b) 5 Sim. 538.

(c) 1 Beav. 563.

(d) 3 Y. & C. 612, n.

(e) 5 Hare, 567.

(f) 2 Madd. 85.

(g) 3 My. & K. 316.

(h) 3 My. & Cr. 127.

(i) 1 Russ. 430

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 {  
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the testator did not intend that the vesting of the shares should depend on the children surviving their mother; and that the Court would seek for the construction which gave the children vested interests in their shares a twenty-one: *Perfect v. Lord Curzon* (a), *Torres v. Franco* (b), *Hope v. Lord Clifden* (c), *Woodcock v. Duke of Dorset* (d), *Howgrave v. Cartier* (e), *Powis v. Burdett* (f), *King v. Hake* (g), *Fry v. Lord Sherborne* (h), *Hallifax v. Wilson* (i), and *Giles v. Giles* (k).

Mr. Bagshawe for Barker, the trustee.

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VICE-CHANCELLOR:

*Judgment.*  
 —

The question to be determined is, whether, in the events which have happened, the 2000*l.* legacy has fallen into the residue of the testator's estate; and this question depends upon whether *Mary Kettlewell* the granddaughter, and *Hannah Meek*,—the children of *Mary Kettlewell* the daughter, who attained twenty-one and died in her life-time, acquired vested interests in this legacy. I am of opinion that they did not.

The immediate disposition under which their claim would arise, is in these terms: "And from and after the decease of my said daughter, the said sum of 2000*l.*" "shall be in trust for all and every the children of my same daughter living at her decease, equally to be divided;" and, under this disposition, it is clear that no child of *Mary Kettlewell* the daughter, who died in her lifetime, could take any interest, the disposition being in terms

(a) 5 Madd. 442.

(b) 1 Russ. & My. 649.

(c) 6 Ves. 499.

(d) 3 Bro. C. C. 569.

(e) 3 V. & B. 79.

(f) 9 Ves. 428.

(g) Id. 438.

(h) 3 Sim. 243.

(i) 16 Ves. 168.

(k) 8 Sim. 360.

confined to children living at her death. This immediate disposition is succeeded by a direction that the shares of the children who should attain twenty-one in the lifetime of *Mary Kettlewell* the daughter, should be paid as soon as conveniently might be after her decease; and that the shares of the children who should be under twenty-one at her decease, should be paid when and as they should attain twenty-one, with the accrued dividends and interest arising therefrom in the meantime; but this direction is confined to the *said* children, and cannot, therefore, be taken to alter or extend the original disposition; and although the following clauses are not in terms limited to the said children, but purport to extend to the children generally, I see nothing in them which is inconsistent with the original disposition of the 2000*l.* legacy in favour of the children living at the death of *Mary Kettlewell* the daughter. The terms in which they are expressed are no doubt to be accounted for by their having reference both to the original legacies of 1000*l.* and to the shares of the 2000*l.* legacy. The first of these clauses is in these terms:—  
 “Provided always, and I do hereby declare, that if any one or more of the children of my said daughter shall happen to die under the age of twenty-one years, without leaving lawful issue, then, and in such case, as well the original legacy or legacies, and share or shares, hereinbefore respectively bequeathed to and in trust for him, her, or them, so dying, as also the legacy or legacies, and share or shares, which shall have survived or accrued to him, her, or them, by virtue of this present proviso, shall go, remain, and be, to the others or other of the said children, if more than one, in equal parts and proportions, but shall not be paid or payable sooner than the original legacy or legacies, and share or shares, of such others or other of them shall become payable.” And whether this clause be construed distributively, so as to carry over the original legacies to the other original legatees, and the

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*Judgment.*

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shares of the 2000*l.* to the co-sharers in that fund, or be construed to carry over as well the original legacy as the share to which an original legatee might be entitled in the 2000*l.* to the co-sharers in that fund, I see nothing in the clause which is inconsistent either with the original legacies or with the shares of the 2000*l.* being taken by the parties to whom they are in the first instance given. The remaining clause is in these terms:—"And I do hereby further declare, that, if all the children of my said daughter shall happen to die under the age of twenty-one years without leaving lawful issue, then and in the last-mentioned case, the said legacies of 1000*l.* a-piece, hereinbefore bequeathed to her three children now living, shall not be raised or raiseable; but, from and after the decease of the last surviving or only child, the same legacies, and from and after the decease of my said daughter, the said sum of 2000*l.* hereinbefore bequeathed to my said trustees, shall respectively sink into the residue of my personal estate, for the benefit of the legatees thereof." But this clause again does not appear to me to alter the classes in whose favour the original legacies and the shares of the 2000*l.* were given. The gift over, in the event of all the children dying under twenty-one, without leaving lawful issue, may, indeed, be taken to import that children attaining twenty-one, or dying under that age leaving lawful issue, were to take vested interests; but if the clause be read distributively, which I think is its fair and reasonable construction, this would not affect the class by whom such vested interests were to be taken; and again, although the words "from and after the decease of my daughter" in this clause, if taken by themselves, might import that the class intended to take the 2000*l.* was not confined to children surviving the daughter, I think it clear, from the context, that these words were inserted merely to preserve the daughter's life interest, and do not, therefore, warrant the conclusion which

might otherwise be drawn from them; the true meaning being, that, in the event mentioned in the clause, the original legacies should sink into the residue on the death of the survivor of the legatees, and the 2000*l.* upon or after the death of the daughter. So far, therefore, as the question has depended upon the provisions of the will, without reference to the decided cases, I have felt but little difficulty upon it.

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 Judgment.

But the argument on the part of the Defendants rested mainly upon the cases which have been decided in favour of the vesting of children's portions at twenty-one or marriage, and certainly those cases have gone to a very great length. I have carefully examined them, in the hope that I might be able to deduce some definite rule, which might govern the present case, or assist in furnishing some guide to future decisions; but I confess myself unable to do so. The rule, as laid down by Sir *W. Grant* in *Howgrave v. Cartier*, is this: "If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision" (a); but this rule leaves it to succeeding judges to determine on each instrument what expressions in the instrument are to be deemed inaccurate or ambiguous, and what clauses are to be considered conflicting and contradictory; and this, I think, must necessarily be the case. At all events, the decided cases, and particularly those before Sir *J. Leach*, have proceeded upon such refined distinctions, and reasoning so subtle, that no certain rule upon these points can, I think, be collected from them. The later authorities, however, I think, indi-

(a) 3 V. & B. 86.

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of vesting car-  
ried to their  
full extent.

cate, that, in the opinion of the Court, the cases in favour of the vesting have been carried to their full extent. Lord *Cottenham* so expresses himself in *Whatford v. Moore* (a), and in the opinion there indicated I fully concur. I think it is the duty of the Court in these cases to give full weight to any ambiguity or contradiction which it may find, but not to strain the meaning of the instrument for the purpose of raising an ambiguity or contradiction. In the present case, I think, that, if I hold the shares of the children who died in the lifetime of *Mary Kettlewell* the daughter to be vested, I should both be straining the meaning of the instrument, and extending the cases in favour of the vesting.

Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains: Shares under a settlement being held not to be vested, might create a resulting trust for the settlor; whilst in a will the residuary legatee might take.

In the first place, the question in this case arises upon a will, and not upon a settlement; and although, after looking into the cases, I cannot venture to say that a different rule of construction upon this subject is to be applied to wills and to settlements, I think that the different character of the instrument is a circumstance to be weighed in determining the effect which is to be attributed to the dispositions contained in them; the more so as, in the case of settlements, the consequence of holding the shares not to be vested might be, to create a resulting trust for the settlor; but, in cases of legacies, the residuary legatee might take. In the second place, this is a question of vesting the interests of grandchildren, and not of children; there is nothing to shew that the testator stood in loco parentis; and some, at least, of the reasons which have influenced the Court in the decisions in favour of children, have no application to the case of grandchildren. And in the third place, this testator has, by his will, drawn the distinction between the gifts which he intended to be vested in his grandchildren, and those which he has expressed to be con-

tingent, giving the three grandchildren, who were living at the date of his will, legacies of 1000*l.* each, in absolute terms, and expressing their shares of the 2000*l.* in terms of contingency, and he has thus made a provision for the grandchildren.

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Judgment.

Looking at these distinctions, and at the whole tenor of this will, I am of opinion that the rights of the children of the daughter in the legacy of 2000*l.*, were meant to be, and were, contingent upon their surviving their mother; and that, all of them having died in her lifetime (one indeed in the lifetime of the testator), the 2000*l.* falls into the residue of the estate.

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DUKE OF NORFOLK *v.* TENNANT.

March 25th.  
& 26th.  
April 1st.

THE Duke of *Norfolk* erected a market-place at *Sheffield*, under the powers of the Act 10 & 11 Vict. c. xlv. (a), which incorporated the Lands Clauses Consolidation Act (b). The Defendant had a leasehold interest in a brewery, situated in a street called *Castle Folds*, immediately opposite the market-place. The reversion of the brewery expectant upon the lease was purchased by and belonged to the Duke. The street called *Castle Folds* was temporarily obstructed in the course of the erection of the market-

Where there is no original equity affecting the claim of a party to compensation under the 68th section of the Lands Clauses Consolidation Act, in respect of lands injuriously affected, the statute does not create such an equity; but take it away.

where there is an original equity affecting the claim, the statute does not

Where, therefore, an agreement for such compensation has been completed and carried out, and the satisfaction perfected, there is no ground for the interference of the Court, arising out of the provision of the statute; but where the Defendant has received the consideration for perfecting the satisfaction, and refuses to perfect it, and a case for specific performance arises, there is nothing in the statute to exclude the interposition of the Court.

The Court does not interfere by injunction to restrain parties who insist that their property has been injuriously affected within the meaning of the 68th section of the Lands Clauses Consolidation Act, from prosecuting their claim under the Act, upon the mere ground that the Act has not provided the means of determining the preliminary question, whether the property has been injuriously affected or not. But whether the same rule applies to a case in which there are several grounds of claim, some of which have been satisfied,—*Quære*.

(a) Local and Personal.

(b) Sect. 4.

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 }  
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place, and was permanently narrowed by the building; and the Defendant alleged, that the height of the building prevented the access of the light and air to the brewery. Under these circumstances, the Defendant, on the 2nd of February, 1852, acting on the 68th section of the Lands Clauses Consolidation Act (a), served the Duke with a notice claiming compensation for the injury occasioned to him by the obstruction and narrowing of the street, and the obstruction of the light and air, and desiring to have the compensation settled by arbitration, under the provisions of the Act; and, on the 5th of March, he served the Duke with a further notice requiring him to appoint an arbitrator.

The bill was filed for an injunction to restrain the proceedings under the notices. The case stated by the bill was in substance,—that the Defendant agreed to accept a plot of ground and two quarters' rent due from him to the Plaintiff, in satisfaction of the injury which he had sustained by the street having been obstructed and narrowed; and as to the obstruction of the light and air, that the Defendant stood by and permitted the building to be erected to its existing height without raising any objection.

*Argument.*  
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Sir W. P. Wood and Mr. Ellison, for the Plaintiff, distinguished the case from that of *The London and North Western Railway Company v. Smith* (b), which has been displaced by the subsequent authorities: *The East and West India Docks and Birmingham Junction Railway Company v. Gatlke* (c), *The South Staffordshire Railway Company v. Hall* (d), and *The Sutton Harbour Improvement Company v. Hitchens* (e).

(a) 8 & 9 Vict. c. 18.

(b) 1 Mac. & G. 216; S. C., 1 H. & T. 364; 5 Railw. Cas. 716.

(c) 3 Mac. & G. 155; 6 Railw.

Cas. 371.

(d) 1 Sim., N. S., 373; S. C., 6 Railw. Cas. 389.

(e) 1 De G., Mac., & G. 161.



Mr. *Rolt* and Mr. *Speed*, for the Defendant, contended, that there was no case for the interposition of a Court of equity. The case of the Plaintiff was, that the Defendant had received either entire or partial satisfaction in respect of his claim. If this were so, it would be open to the Plaintiff to prove that fact before the arbitrator, and thereby to extinguish or diminish the claim of the Defendant. The application was, therefore, no more than a repetition of *Smith's case*, which had been distinctly overruled.

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 Argument.

VICE-CHANCELLOR:—

After carefully considering the affidavits on both sides, I am of opinion, that, subject to the questions which were raised in the argument on the part of the Defendant as to the jurisdiction of the Court and the frame of the pleadings, there is a sufficient case for the injunction.

Judgment.

The questions which were raised by the Defendant as to the frame of the pleadings and the jurisdiction of the Court were,—that the bill alleges that the Defendant had received compensation for the injury occasioned by the street having been obstructed and narrowed; and that this allegation brought the case directly within the principle of *The East and West India Docks and Birmingham Junction Railway Company v. Gattke* (a); but although the bill is not in this respect so aptly framed as it might have been, I think, that, upon the whole, the fair meaning of it is,—not that the agreement has been completed and carried out and the satisfaction perfected, but that the Defendant has received the consideration for perfecting the satisfaction, and refuses to perfect it, thus opening the case for specific performance; and although the bill does not pray that relief, I think the facts are sufficiently stated

(a) 3 Mac. & G. 155; 6 Railw. Cas. 371.

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 }  
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 Judgment.

to found a decree for it; and this case being thus open upon the pleadings, I am of opinion, that *Gatlke's case* does not affect the present question. That case has overruled *The London and North Western Railway Company v. Smith (a)*, and has settled, on most satisfactory grounds, that this Court ought not to interfere by injunction to restrain parties, who insist that their property has been injuriously affected within the meaning of the 68th clause of the Lands Clauses Consolidation Act, from prosecuting their claims according to the powers of the Act, upon the mere ground that the Act has not provided the means of determining the preliminary question, whether the property has been injuriously affected or not, but it has settled no more. Whether the same rule would apply to a case in which there are several grounds of claim, some of which have been satisfied, remains yet to be determined; and not having had the benefit of a full argument upon the point, I shall not now determine it. At all events, the case does not touch the question of the interference of this Court, where there is an original equity affecting the claim. The case decides, that, where there is no original equity affecting the claim, the statute does not create such an equity; but where there is an original equity affecting the claim, the statute does not, in my opinion, take it away. It is, I think, as much the duty of this Court to interpose by injunction in such cases as in the ordinary case of an attempt to put in force the powers of the Act for compulsory purchase, where the purchase has been the subject of contract; and being of opinion that the Plaintiff has in this case sufficient grounds for contending that some at least of the claims of the Defendant are affected by a contract entered into before the claims were advanced, I think that this injunction must be granted.

It was urged by the Defendant, that it ought to be limited so as to extend only to the claims for obstructing

(a) 1 Mac. & G. 216; S. C., 1 H. & T. 364; 5 Railw. Cas. 716.

and narrowing the street; but having regard to the provisions of the Act as to costs, I think that it cannot be so limited. The Defendant, if he thinks it right to prosecute the claim as to the obstruction to the light and air, before the equity raised by the bill against that claim is determined, must give a fresh notice for the purpose.

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 }  
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 Judgment.

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HUGHES v. WELLS.

**A** BILL, by the personal representative of the surviving trustee of the settlement made upon the marriage of Sir

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 Nov. 20th,  
 Dec. 22nd, & 24th,  
 Dec. 11th.  
 1852.  
 April 29th.

By a marriage  
 settlement,  
 monies in the  
 funds, monies

lent on mortgage, and other property, were assigned to trustees upon trust to pay and transfer the same unto such persons, for such estates or interests, either absolutely or conditionally, and in such parts, shares, and proportions, manner and form, and under and subject to such powers, provisoes, &c., either for the benefit of the issue of the intended marriage, or of any other persons whomsoever, as the wife, notwithstanding her coverture, at any time or times, and from time to time during the joint lives of herself and her husband, should, by and with the consent and approbation of her husband, testified in writing under his hand and seal, or as the wife alone, after the decease of the husband, in case she should survive him, should by any deed or writing, to be sealed and delivered by her in the presence of and attested by two or more witnesses, direct or appoint; and in default of such direction or appointment, and in the meantime and until such direction or appointment should be made and executed, and subject thereto, and as to so much of the said trust monies, &c., whereof no such direction or appointment should be made, upon trust, to receive the annual proceeds due, and to grow due, for or in respect of the same, and pay the same to such persons as the wife, during her life, notwithstanding her coverture, and whether sole or covert, should, from time to time, by any writing or writings under her hand, direct or appoint to receive the same, and in default of such direction or appointment into the proper hands of the wife for her separate use. The monies in the funds were transferred to the husband by virtue of powers of attorney, under the hand and seal of the wife, with the consent of the husband under his hand and seal, and attested by two witnesses; and the mortgage money was received and a receipt given by the husband and wife, and the premises reconveyed, and the receipt and reconveyance also so attested.

*Held*, that the powers of attorney were not directions, but were merely authorities to the bankers by the wife to assign the stock to her husband, and only enabled the bankers to do for her what she might have done for herself, without their intervention. That, as the directions must follow on the authorities before the authorities could be acted on, it still remained to make the appointment after the execution of the powers of attorney, and that the transfers made subsequently to such execution, being unaccompanied by any of the formalities required by the settlement, could not have the effect of converting instruments of substitution into instruments of alienation, and could not operate as executions of the power of appointment.

That the wife had no power to dispose of the trust funds otherwise than by a perfect appointment.

That, in order to constitute a purchaser in whose favour a defective execution of a power will be aided in equity, there must be a consideration and an intention to purchase, either proved or to be presumed; and the maintenance of his household and establishment by the husband does not furnish such consideration to the wife.

That, if the transfer of a wife's legacy to herself by the husband be a consideration, it does not shew any intention to purchase.

That, if a wife thinks proper to keep up an establishment against the wishes of the husband,

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 —  
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*John and Lady Wells*, for the purpose of recovering some of the trust funds comprised in the settlement, which came to the hands of *Sir John Wells*, and which were in part laid out in the purchase of an estate called the "*Bolnore*" estate, and of a lease of that estate, and in building and improvements upon it. The *Bolnore* estate, when purchased, was conveyed to *Sir John Wells* in fee; and in consequence of his death (which took place in November, 1841,) without heirs, and intestate as to the *Bolnore* estate, the estate escheated to the lords of the fee, and the bill as against them sought to establish a lien on the estate for the sums expended in the purchases and improvements, and to have the residue of the trust monies received by *Sir John Wells* paid out of the estate as part of his assets.

The facts of the case were found by a report made under an order directing preliminary inquiries, and were these:—By an indenture of settlement of the 19th of

what is supplied for the establishment will be a consideration for payments out of her estate on that account.

That, the proceeds of the settled funds having been placed to the wife's account at her bankers, and applied principally to the current expenses of the establishment of her husband and herself, by the order and direction of the wife, the husband being the agent in their application,—as to monies so applied, there was a defective appointment, which ought to be aided by the Court.

If the husband have not in any degree influenced the acts or conduct of the wife, there is no reason why (the wife having been constituted a feme sole by the settlement,) her assets, including the trust funds which have become her assets by the exercise of her power, should not be bound to the same extent as the assets of any other person, not under the disability of coverture, would be bound in the same circumstances.

The rights of married women may be barred, and their estates affected, by active participation in breaches of trust, and if—their powers having been exercised by will—the trust funds become their assets, they must be liable for those breaches of trust, *semble*. But the fact of a married woman having permitted her husband to receive the trust funds does not preclude a right to relief by her or her appointee, for that would be to defeat the purpose for which the trust was created,—the protection of the wife against the husband.

Under the Escheat Act, trust monies may be followed into land against the lords of the fee; and if it were otherwise, the estate in the hands of the lord by escheat is liable to the debts of the person whose estate has escheated.

The non-interference of the trustees for a long period does not preclude them or their representative from sustaining a suit for carrying the trust into effect, so long as the trust subsists. But, *semble*, on the contrary it is the duty of the trustees or their representative to take steps for enforcing the trust.

April, 1815, *Lady Wells* (then *Jane Dealtry*) granted and transferred unto *King and Hughes*, their executors, &c., all and singular the sum and sums of money, stocks, funds, and securities whatsoever, of or belonging to her, and also all and singular her furniture, china, plate, books, pictures, and trinkets, and other personal estate and effects, to hold the same unto the said trustees, upon trust, after the marriage then intended between herself and *Sir John Wells* should be had, that the trustees should pay, assign, and transfer the said trust funds, monies, and securities, and other the premises, unto such person or persons, for such estate or estates, interest or interests, either absolutely or conditionally, and in such parts, shares, and proportions, manner and form, upon such trusts, and under and subject to such powers, provisos, limitations, and declarations, either for the benefit of all or any of the issue of the then intended marriage, or of any other person or persons whomsoever, as the said *Jane Dealtry*, notwithstanding her coverture, at any time or times, and from time to time during the joint lives of herself and the said *Sir John Wells*, should, by and with his consent and approbation, testified in writing under his hand and seal, or as the said *Jane Dealtry* alone, after the decease of *Sir John Wells*, in case she should survive him, *should*, by any deed or deeds, writing or writings, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, direct, limit, or appoint; and in default of such direction, limitation, or appointment, and in the mean time until such direction, limitation, or appointment should be made and executed, and subject thereto, and as to so much of the trust monies, funds, securities, and premises, whereof no such direction, limitation, or appointment should be made, upon trust, that the trustees should, during the life of the said *Jane Dealtry*, receive and take the dividends, interest, and annual proceeds, due and to grow due for or in

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respect of the said trust monies, funds, and securities, and pay the same to such person or persons as the said *Jane Dealtry*, during her life, notwithstanding her intended or any future coverture, and whether sole or covert, should, from time to time, by any writing or writings under her hand, direct or appoint to receive the same; and in default of such direction or appointment, into the proper hands of the said *Jane Dealtry* for her own sole and separate use and benefit, independently of the debts, control, or engagements of her husband; and also should permit and suffer the said *Jane Dealtry*, during her life, notwithstanding any such coverture, to use and enjoy the furniture, china, plate, books, pictures, and trinkets, and other articles, for her separate use; and from and after her decease, to pay and transfer the trust monies and premises for the issue of the marriage, or such other persons as she should by will appoint; and in default of such appointment to the issue of the marriage; and in default of such issue, in trust for her next of kin according to the statute of distributions, exclusive of the husband.

The personal estate to which *Lady Wells* was entitled at the date of the settlement consisted of 5600*l.* Consols, and 1050*l.* 4*l* per cent. Stock, standing in her name; 1500*l.*, lent by her on mortgage to one *John Wray*; the sum of 1940*l.*, lent by her on mortgage to Sir *J. C. Throckmorton*; a moiety of 3566*l.* 13*s.* 4*d.* Consols, standing in the name of *Peregrine Dealtry*, deceased; a moiety of 10,000*l.*, late the property of *Peregrine Dealtry*, and charged on certain estates of Sir *Henry Vavasour*; a moiety of 7500*l.*, lent by *Peregrine Dealtry* on mortgage to one *William Johnson*; a moiety of 6000*l.*, lent by *Peregrine Dealtry* on mortgage to one *Wroe Walton*; a moiety of eight shares in the *Driffeld Navigation Company*, late the property of *Peregrine Dealtry*; and a moiety of 500*l.* due to *Peregrine Dealtry* upon turnpike bonds. *Lady Wells* and her sister

*Elizabeth* were the sisters and co-heiresses-at-law of *Peregrine Dealtry*, who died intestate, and were also the administratrixes of his personal estate.

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The stock was not transferred into the names of the trustees, nor was any transfer or assignment made to them of the other property of *Lady Wells*, except by the effect of the settlement of the 19th of April, 1815. The trustees did not in any manner interfere in the receipt, management, or disposition of the settled property, but the same were dealt with by *Sir John* and *Lady Wells* in the manner stated in the report.

It appeared that *Lady Wells*, before her marriage, kept a banking account with Messrs. *Smith & Co.*, bankers, of *London*, in her then name of *Jane Dealtry*; and that, after her marriage, and on the 30th of May, 1815, she opened a new account with Messrs. *Smith & Co.*, in her then name of *Jane Wells*, and 230*l.* 17*s.* 6*d.*, the balance standing to the credit of her former account, was carried to the new account, and such last account was continued up to the time of her death. The income of all the settled property, or the greater part thereof, was from time to time paid to the said Messrs. *Smith & Co.*, to the credit of the said account of *Lady Wells*. *Sir John Wells* was not, at the time of his marriage, possessed of any real estate, and he was possessed of very trifling personal estate; he did not acquire any property during his marriage, and the only income he possessed was his half-pay as an Admiral in the Royal Navy. On the 30th of May, 1815, *Sir John Wells* opened an account in his own name with Messrs. *Smith & Co.*, and the sum of 1200*l.* was transferred to the credit of such account from the account of *Lady Wells*; and such 1200*l.*, and another sum of 79*l.* 10*s.*, were the only sums placed to the credit of his account. On the 24th of January, 1816, a balance of 409*l.* 7*s.* having become due from

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Sir *John Wells* to the Messrs. *Smith & Co.* upon the account, such balance was, with the consent of Lady *Wells*, transferred to the debit of her account with the same bankers, and the account of Sir *John Wells* was closed. Upon the marriage of Sir *John* and Lady *Wells*, they went to reside in the neighbourhood of *Cuckfield*; and for the purpose of enabling them the more conveniently to make payments in the neighbourhood, an account was, on the 1st of May, 1815, opened with Messrs. *Hurly & Co.*, bankers, of *Lewes*, in the name of the said Sir *John Wells*, and this account was continued until his death. On the 6th of October, 1815, Lady *Wells*, by a letter of that date, authorised Messrs. *Smith & Co.* to honour the drafts of Sir *John Wells* against her separate account; to which letter they replied by letter dated the 7th of October, 1815, that they would pay any drafts Admiral *Wells* might draw on her account, as she wished, intimating that Admiral *Wells* should state on such drafts that the same were on her account. From that date the monies drawn from Messrs. *Smith & Co.*, for the purpose of supplying the account with Messrs. *Hurly & Co.*, and the other purposes of Sir *John* and Lady *Wells*, were drawn by cheques of Sir *John Wells*. The yearly expenditure of Sir *John* and Lady *Wells* (independent of the expenditure on the *Bolnore* estate) exceeded the amount of their income; and there was not therefore any accumulation of the income of Lady *Wells* during the life of Sir *John Wells*, but, on the contrary, a considerable part of the principal of the fortune of Lady *Wells* (besides the amount expended on the *Bolnore* estate) was expended by Sir *John Wells*. In the month of January, 1816, 1678*l.* 6*s.* 8*d.* Consols, part of the 3566*l.* 13*s.* 4*d.* Consols, the property of *Peregrine Dealtry*, were sold by Messrs. *Smith & Co.*, by virtue of a power of attorney for that purpose, dated the 1st of January, 1816, under the hands and seals of the said Sir *John* and Lady *Wells* and *Elizabeth Dealtry*, executed in the presence of and



attested by two witnesses; and the sum of 1069*l.* 17*s.* 5*d.*, being the proceeds of such sale, was, on the 12th of January, 1816, placed by Messrs. *Smith & Co.* to the credit of Lady *Wells*' account. In the year 1817, 2000*l.* Consols were bequeathed to Lady *Wells* by a Mr. *Langley*, and were, with the sanction of Sir *John Wells*, transferred by the executors into the name of Lady *Wells*; and the dividends thereon were from time to time, until the same were sold, received by Messrs. *Smith & Co.*, by virtue of a power of attorney under the hands and seals of Sir *John* and Lady *Wells*, and placed to the account of Lady *Wells* with them. On the 11th of January, 1820, 500*l.* Consols, part of the 2000*l.*, were sold out for the purpose of making an advance to *William Sergison*; and the sale thereof was effected by Messrs. *Smith & Co.*, by virtue of a power of attorney dated the 5th of January, 1820, under the hands and seals of Sir *John* and Lady *Wells*, in the presence of and attested by two witnesses. The proceeds of the sale, amounting to the sum of 338*l.* 12*s.* 6*d.*, were placed to the credit of Lady *Wells*' account. Shortly afterwards the sum of 300*l.* was advanced in the name of Sir *John Wells* to *William Sergison*, by a cheque drawn by Sir *John Wells* on Messrs. *Smith & Co.*, against the account of Lady *Wells*. About the 9th of January, 1821, 500*l.* Consols, further part of the 2000*l.*, were sold out by Messrs. *Smith & Co.* by a power of attorney dated the 26th of December, 1820; and the produce of such sale, amounting to the sum of 347*l.* 7*s.* 6*d.*, was placed to the credit of Lady *Wells* in her account with Messrs. *Smith & Co.*, and was applied in meeting the current expenses of Sir *John Wells*.

The 5600*l.* Consols, and 1050*l.* 4*l.* per cent. Stock, part of the settled property, were, in July, 1821, transferred to Sir *John Wells*; and other parts of the settled property were received by Sir *John Wells*, viz. on the 12th of January, 1816, 1069*l.* 17*s.* 5*d.*, the produce of the sale

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of 1678*l.* 6*s.* 8*d.* Consols, part of the 3566*l.* 13*s.* 4*d.* Consols; on the 23rd day of February, 1826, the sum of 3750*l.*, being one moiety of the 7500*l.* due on *Johnson's* mortgage; on the 2nd of June, 1826, 1940*l.*, due on mortgage from Sir *J. C. Throckmorton*; on the 21st of July, 1827, the sum of 3000*l.*, being one moiety of 6000*l.* due on *Walton's* mortgage; and on the 16th of October, 1847, the sum of 1500*l.*, due on *Wray's* mortgage. Sir *John* and Lady *Wells* executed a release and assignment of the mortgage, sealed and delivered by them in the presence of and attested by two witnesses, with a receipt for the consideration-money indorsed, and signed and attested in like manner. The other monies, so received by Sir *John Wells*, were received with the sanction and consent of Lady *Wells*, but not otherwise under any order or authority for that purpose given by her, or under any written act or authority.

The powers of attorney for the transfer and sale of the stock were in the form usually required at the Bank of England (*a*), and were sealed and delivered by Sir *John*

(*a*) The form was as follows:—  
 “KNOW ALL MEN by these presents, that I, *Jane Wells*, wife of Vice-Admiral Sir *John Wells*, K.C.B., now of &c., formerly *Jane Dealtry*, of &c., my said husband consenting by signing and sealing these presents, do make, constitute, and appoint *S. Smith & Co.*, all of London, bankers, my true and lawful attorneys jointly, and each of them separately, for me and in my name and on my behalf, to receive and give receipts for all dividends that are now due and that shall hereafter become due on any of the present or future interest or share in the capital or joint-stock of 3*l.* per cent. Annuities, created by an

Act of Parliament of the 25th year of the reign of his Majesty King George the Second, intituled ‘An Act for converting the several annuities therein mentioned in several joint-stocks of annuities, transferable at the Bank of England, to be charged on the sinking fund, &c.’ and by several subsequent Acts, standing in my former name of *Jane Dealtry*, spinster, aforesaid; also to assign and transfer 5600*l.*, being all my said joint annuity stock standing as aforesaid, unto Vice-Admiral Sir *John Wells*, K.C.B., of &c., and to do all acts requisite for effecting the premises, I hereby ratifying and confirming all that my said attorneys,

and Lady *Wells*, in the presence of and attested by two credible witnesses.

In October, 1827, the 1500*l.* secured to Lady *Wells* by *Wray's* mortgage was paid off; and the sum of 1518*l.* 15*s.*, the amount of the principal and interest, was paid to the account of Lady *Wells* with Messrs. *Smith & Co.*, on the 16th of October, 1827; and thereupon Sir *John* and Lady *Wells* executed a release and assignment of the mortgage, by indentures of lease and release of the 3rd and 4th of October, 1827, which were sealed and delivered by them in the presence of and attested by two witnesses. On the indenture of lease was indorsed a receipt for the consideration money, signed by Sir *John* and Lady *Wells* in the presence of and attested by two witnesses; but in the indenture of release of the 4th of October, 1827, the settlement was not recited or referred to, and the 1500*l.* and

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or either of them, shall do therein by virtue hereof; and in case of my death, this letter of attorney, as to all matters and things which after my decease shall be done by my said attornies, or either of them, by virtue of or under colour or in pursuance thereof, shall, so far as the Governor and Company of the Bank of England are interested or concerned, be as binding upon my executors and administrators as the same would have been upon me if living, unless notice in writing of my death shall have been previously given to the said Governor and Company by my executors or administrators, or by some person or persons interested in the property to which this letter of attorney refers; and unless such notice be given, I

hereby promise and engage, and bind myself, my executors and administrators, to and with the said Governor and Company of the Bank of England, that they, my said executors or administrators, shall and do allow, ratify, and confirm, as good, valid, and effectual against them and against my estate, whatsoever shall or may be done by my said attornies, or either of them, after my decease, so far as the said Governor and Company of the Bank of England shall or may be in any way or manner interested therein.—In witness whereof I have hereunto set my hand and seal the 13th day of July, in the year of our Lord 1821.

"JANE WELLS, late DEALTRY.

"JOHN WELLS."

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interest were therein expressed to be paid to the said Sir John and Lady Wells.

In October, 1825, Sir John Wells, with the concurrence of Lady Wells, entered into a contract to purchase the *Bolnore* estate, in the parish of *Cuckfield*, subject to a lease, for 5500*l.*, and paid 500*l.* as a deposit on the said purchase, by a cheque drawn by him on Messrs. *Hurly & Co.*

In October, 1825, 333*l.*, and in February, 1826, 3597*l.* 2*s.* 9*d.*, making together 3930*l.* 2*s.* 9*d.*, part of the settled property, were expended by Sir John Wells in and about the purchase of the *Bolnore* estate. The sum of 1000*l.*, also part thereof, was laid out in the purchase of the lease of the same premises (such lease being for the term of twenty-one years from the 24th day of June, 1814); and sums of money, amounting together to 3597*l.* 5*s.* 9*d.*, further part of the settled property, were laid out in and about the rebuilding of the mansion house on the same estate.

After the marriage, the health of Lady Wells, which was before delicate, became more so, and she was always desirous of not being annoyed with money matters or business of any kind, and took very little part in the management of her affairs; and Sir John Wells, with her general approbation, managed the same. Some time after their marriage, Sir John and Lady Wells went to reside at *Butler's Green*, in *Sussex*, as tenants of a partly furnished house; and while they were so residing there, and previous to the purchase of the *Bolnore* estate, Lady Wells was desirous of purchasing an estate, in order to be near her only sister Miss *Elizabeth Dealtry*, who resided at *Rottingdean*. Inquiries after several estates in the neighbourhood were made by Sir John and Lady Wells. Sir

*John Wells*, in speaking of the trust monies and property, always spoke of the same as the trust monies of *Lady Wells*, and not as his own property, and was very particular in having all her monies paid to her account at Messrs. *Smith & Co.*, and always expressed his desire that her monies should be kept in such account, and frequently stated that he did not wish that *Lady Wells* or any member of her family should be able to say that he had taken possession of any of the monies of *Lady Wells* for his own benefit. Sir *John Wells* was averse to purchasing a property, and frequently complained of the great outlay in the purchase of the *Bolnore* estate, and particularly in the buildings and improvements after the purchase, and stated that he felt he could not stop or reduce the expenditure, as the money was the property of *Lady Wells*; and that such expenditure was made at her desire; but that he had occasionally remonstrated with her on the subject. Sir *John Wells* stated to his navy agent and friend, Mr. *J. P. Atkins*, in conversation with him, that the said *Bolnore* estate had been bought with the money of *Lady Wells*.

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The original bill was filed in the lifetime of *Lady Wells* against her and the parties claiming to be interested under the escheat. *Lady Wells* afterwards died, and, by her will, dated in May, 1842, reciting the settlement of April, 1815, she devised, bequeathed, and appointed all her estate and interest, as well legal as equitable, of, in, to, or out of the *Bolnore* estate, purchased by her late husband with part of the monies belonging to her, and comprised in the settlement of April, 1815, but of which estate he had died intestate, and also all her residuary, real, and personal estate, to her sister *Elizabeth Dealtry*, her heirs, executors, &c.

*Elizabeth Dealtry* survived *Lady Wells*, and died in 1844,

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having appointed *C. Beard* her executor; and administration to *Sir John Wells*, to *Lady Wells*, and to *Elizabeth Dealtry*, were granted to *C. Beard*, who was brought before the Court by a supplemental bill.

*Argument.*  
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*Mr. Bethell* and *Mr. Prior* for the Plaintiff.

*Mr. Follett* and *Mr. Karlake*, for the Defendant *Beard*, supported the argument on behalf of the Plaintiff.

*Mr. Rolt*, *Mr. Campbell*, and *Mr. Selwyn*, for the Defendants, the lords of the fee, claiming the estate by escheat.

All the points raised by the argument are distinctly considered in the judgment. On the point insisted upon by the Plaintiffs, that the mode of dealing with the settled property did not amount to an exercise of the power, *Reith v. Seymour* (a), *Cocker v. Quayle* (b), *Denn v. Roake* (c), *Moodie v. Reid* (d), *Milnes v. Busk* (e), *Hopkins v. Myall* (f), *Brookman v. Hales* (g), *Rowe v. Rowe* (h), *Martin v. Mitchell* (i), were cited.

On the other side, in support of the contrary proposition, *Barford v. Street* (k), *Irwin v. Farrer* (l), *Holloway v. Clarkson* (m), were cited. And that *Lady Wells*, and her personal representatives, and all persons claiming under her, were precluded from following the trust funds, after the dealings which had taken place, they cited *Pollard v. Greenvil* (n), *Stead v. Nelson* (o), *Nail v. Punter* (p), *Pawlet v.*

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| (a) 4 Russ. 263.   | (i) 2 J. & W. 413.  |
| (b) 1 Russ. & My. 535.                                   | (k) 16 Ves. 135.  |
| (c) 5 B. & C. 720; Sugd. Pow., Vol. 1, p. 420, 7th edit. | (l) 19 Ves. 86.   |
| (d) 1 Madd. 518.   | (m) 2 Hare, 521.  |
| (e) 2 Ves. jun. 488.                                     | (n) 1 Chan. Cas. 10; Rep. Ch. 185; Sugd. Pow., Vol. 2, p. 96, 7th edit. |
| (f) 2 Russ. & My. 86.                                    | (o) 2 Beav. 245.  |
| (g) 2 V. & B. 45.  | (p) 5 Sim. 555.   |
| (h) 2 De G. & S. 294.                                    |   |

*Delaval*(a), *Caton v. Rideout*(b), *Beresford v. The Archbishop of Armagh* (c), *Bartlett v. Gillard* (d), *Earl of Kinnoul v. Money* (e), and *Boughton v. Sandilands* (f).

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*Argument.*

In support of the argument of the Plaintiff, that trust funds improperly, or without due authority, laid out in the purchase of lands, might be followed as against the lands purchased, they cited *Lane v. Dighton* (g), *Lench v. Lench* (h), *Lewis v. Madocks* (i); and that the lands in the hands of the lord by escheat were chargeable with the debts or obligations of the intestate: *Viscount Downe v. Morris* (k), *Evans v. Brown* (l), *Rogers v. Maule* (m); and that a bill to obtain payment of debts out of real estate might be sustained, though not filed by a creditor: *Dinning v. Henderson* (n), *Price v. Price* (o).

On the part of the Defendants, it was also contended, that the non-interference of the trustees, for so long a period, precluded the Plaintiff from sustaining the suit: *M'Leod v. Drummond* (p).

VICE-CHANCELLOR:—

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—  
*Judgment.*  
—

The first question raised at the hearing was upon the right of the Plaintiff to maintain the suit. It was objected, on the part of the Defendants, that the trustees not having acted or interfered in the trust for so long a period

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| (a) 2 Ves. 663.       | (i) 17 Ves. 48.     |
| (b) 1 Mac. & G. 599.  | (k) 3 Hare, 398.    |
| (c) 13 Sim. 643.      | (l) 5 Beav. 114.    |
| (d) 3 Russ. 149.      | (m) 1 Y. & C. C. 4. |
| (e) 3 Swanst. 202, n. | (n) 2 Col. 330.     |
| (f) 3 Taunt. 342.     | (o) 15 Sim. 484.    |
| (g) Amb. 409.         | (p) 17 Ves. 152.    |
| (h) 10 Ves. 511.      |                     |

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of time, it was not competent to the Plaintiff now to sue as personal representative of the surviving trustee. But the object of this suit is to recover the trust funds comprised in the settlement against the estate of Sir *John Wells*; and in order to maintain this objection, it must, I think, be incumbent on the Defendants to make out, that, independently of any question as to Sir *John Wells* having acquired a right to the funds, which is the point to be tried in the cause, the trusts of the settlement have been determined and put an end to. If the trusts of the settlement subsist, apart from the question as to the right acquired by Sir *John Wells*, it is through the medium of the Plaintiff, as trustee, that the trust funds must be recovered, for whosoever benefit they are to be recovered. Looking at the facts found in this report, I think that, apart from the question of right acquired by Sir *John Wells*, it cannot be considered that the trusts of the settlement have been determined or put an end to; and I am of opinion, therefore, that this objection cannot be maintained, and that it is necessary to consider the case upon the merits.

The case appears to me to resolve itself, upon the merits, into three principal points—First, whether Lady *Wells* made any perfect appointment of any part of the trust funds in favour of Sir *John Wells*. Secondly, whether Lady *Wells* had power to make, and whether she in fact made, any effectual appointment or disposition of any part of the trust funds, otherwise than by a perfect appointment, in favour of Sir *John Wells*. And thirdly, whether any portion of the funds which may appear not to have been well appointed or disposed of, can be recovered from the lords of the fee.

As to the first point, whether Lady *Wells* made any perfect appointment of any part of the trust funds in favour



of Sir *John Wells*, it was argued on the part of the Defendants that the power of appointment was perfectly executed, in favour of Sir *John Wells*, by the powers of attorney for the transfer of the stock and the transfers made under them, and by the deed of assignment and release of *Wray's* mortgage. But I am of opinion that the power of appointment was not perfectly executed, either as to the stock or the mortgage money. Two things are, I think, necessary to the perfect execution of a power of appointment,—that the act required to be done should be done with the formalities prescribed, and that there should be an intention by that act to execute the power. That the act to be done should be accompanied by the intention to execute the power by that act, seems to me to follow from the nature of powers. A power is an authority to do an act: unless the act be done in pursuance of the authority, it can be no exercise of the power; and it cannot be done in pursuance of the authority, unless there be the intent to pursue it. The cases, I think, fully bear out this view. Thus, if there be an interest and a power, and an act be done which can take effect out of the interest or the power, it takes effect out of the interest, there being no evidence of the intention to exercise the power; but if it cannot take effect out of the interest, it takes effect out of the power, the circumstances proving the intent to exercise it: *Maundrell v. Maundrell* (a). We have, therefore, in this part of the case to consider two distinct points, the acts and the intention.

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First, as to the acts: the powers of attorney, the transfers under them, and the assignment of the mortgage. The powers of attorney, it is true, are under the hand and seal of Lady *Wells*, and with the consent of Sir *John Wells*, under his hand and seal, and attested by two wit-

(a) 10 Ves. 257.

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nesses. But what is the nature of the instruments? They are mere authorities to the bankers in the name of Lady *Wells*, and on her behalf, to assign and transfer the stocks to Sir *John Wells*. They are authorities and not directions. They are merely instruments enabling the bankers to do for Lady *Wells*, when she shall so direct them, what she herself might have done without their intervention. Her directions must follow upon the authorities before they can be acted upon; and how can it be said, that the power was executed when the authorities were given but the directions are wanting. It is from the direction and not from the authority that the interest of the appointee must flow; and it is therefore to the direction and not to the authority that the formalities prescribed by the power require to be applied. In truth, the powers of attorney merely place the bankers in the position of Lady *Wells* as to the power of dealing with the funds; and it still remains with her to make the appointment, as it would have done if she had not executed the powers of attorney.

Do then the transfers alter the position of the case? They are not accompanied by any of the forms prescribed by the power; and to give them operation as executions of the power of appointment by means of the formalities connected with the powers of attorney, would be to convert those instruments, which, in their origin, and until the transfers were made, were instruments of substitution only, into instruments of alienation. This, I apprehend, cannot be done. What was required was an appointment by Lady *Wells* directing the transfer, and not a mere power of attorney, substituting a person in her place to make the transfer when directed by her.

The case as to the mortgage does not appear to me to be different. It was a mere receipt of the money upon a transfer, by Sir *John* and Lady *Wells*, of the security, not having as between them any operation.

We have next to consider the intention with which these instruments were executed—whether they were executed for the purpose of exercising the power of appointment. There is no direct evidence upon the subject, and the conclusion must be drawn from the facts. On the one hand, it would appear, that the parties lived somewhat beyond their income; and no doubt the exercise of the power would have afforded them the means of extrication from any difficulties in which they might have been involved. But, on the other hand, if it was intended to execute the power of appointment, it is most singular that no formal instrument was executed for the purpose. And it appears that Lady *Wells* was averse to business; that, soon after her marriage, she devolved upon her husband the management of her affairs; that the great bulk of the stock was transferred into his name in 1821, when there does not appear to have been any present purpose of dealing with it, and that it was not in fact dealt with till 1825; that, although some part of the stock was sold in 1816, the proceeds were placed to Lady *Wells*' account; that this was the case also with the proceeds of the mortgage transferred in 1827; and that the income of all the settled property was also, from time to time, carried to that account; and in addition to all this, there are the declarations of Sir *John Wells*, which are found by the report. It is to be remembered, too, that these were transactions between husband and wife; and that, in such transactions, where it is sought to establish gifts from one party to the other, the evidence must be clear and undoubted. After carefully weighing these facts, with the considerations which attach to them, I cannot justify to myself the conclusion, that these instruments either were or were intended to be executions of the power of appointment.

We come then to the second question—whether Lady *Wells* had power to make, and whether she in fact made,

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any effectual appointment or disposition of any part of the trust fund, otherwise than by a perfect appointment in favour of Sir *John Wells*.

The argument on the part of the Defendants, that Lady *Wells* had power to make, and did make, such an appointment or disposition, was rested upon two grounds: first, that her life estate, coupled with her power of appointment, was tantamount to the absolute ownership in her; and that she had, therefore, power to give, and that she did give, the funds to Sir *John Wells*; secondly, that there was a defective execution by her of her power of appointment, which a Court of equity would aid. Before entering upon the first of these grounds, it is, I think, necessary to consider whether there is any foundation for the argument which was strongly urged on the part of the Defendants—that the power of appointment created by the settlement was one which it was competent to Lady *Wells* to execute during the joint lives of herself and Sir *John Wells*, without observing any formalities; for if this position can be maintained, the Defendants' argument upon this point will, no doubt, be materially aided. The power is thus created: the trustees, after the solemnisation of the marriage, were to stand possessed of the trust funds, upon trust, to pay, assign, and transfer the same “unto such person or persons, for such estate or estates, interest or interests, either absolutely or conditionally, and in such parts, shares, and proportions, manner and form, upon such trusts, and under and subject to such powers, provisoes, limitations, and declarations, either for the benefit of all or any of the issue of the said intended marriage, or of any other person or persons whomsoever, as the said *Jane Dealtry*, notwithstanding her coverture, at any time or times, and from time to time, during the joint lives of herself and the said *John Wells*, shall, by and with the consent and approbation of the said *John Wells*, testified in

writing under his hand and seal, or as she the said *Jane Dealtry* alone after the decease of the said *John Wells*, in case she shall survive them, by any deed or deeds, writing or writings, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, direct, limit, or appoint." And the argument upon the part of the Defendants was, that, upon the true construction of this sentence, the trust was to be for such persons as *Lady Wells*, during the joint lives, should, "with the consent of *Sir John Wells*, direct, limit, and appoint;" and not merely for such persons as *Lady Wells* should, during the joint lives, with the like consent, "by deed or writing sealed and delivered and attested, direct, limit, and appoint." But this would be a most forced construction of the sentence. The object of the settlement must of course be taken to have been to protect *Lady Wells* during the coverture; but the effect of this construction would be, to throw a careful protection around her as to the exercise of the power after the determination, but to give her no protection in the exercise of the power during the continuance, of the coverture. Besides, it would be unreasonable to suppose that *Sir John Wells'* consent in writing under hand and seal was meant to be required to an appointment, which, according to this argument of the Defendants, might be made by *Lady Wells* even by parol. And I entertain no doubt, therefore, that, upon the true construction of this clause, the power created by it in favour of *Lady Wells*, whether executed during the coverture or after its determination; could be exercised only by deed or writing, sealed and delivered by her in the presence of and attested by two or more credible witnesses.

It being necessary then that the power should be exercised with the prescribed formalities,—is the life estate, coupled with such a power, tantamount to absolute ownership? It was insisted on the part of the Defendants that

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it was; and *Barford v. Street* (a) was relied on as an authority upon the point; but I think that *Barford v. Street* warrants no such conclusion. In that case, the power had been exercised, and the simple question, as I understand the case, was, whether the instrument creating the power warranted the instrument by which it was exercised; and when Sir *William Grant* said, that "an estate for life, with an unqualified power of appointing the inheritance, comprehends everything" (b), it was in answer to the argument which had been urged, that the directions of the instrument creating the power were inconsistent with the notion of property; and what he meant, therefore, was, that the directions were not inconsistent with the notion of property, because they extended to the power of acquiring the absolute property; and the context of the judgment plainly shews that this was his meaning. The cases of *Irwin v. Farrer* (c), and *Holloway v. Clarkson* (d), were also cited upon this part of the case; but in those cases no formalities were required in the execution of the powers, and they have therefore no application to the present case. It may be well, however, to observe, that even those cases do not go so far as to treat the life estate with the power as tantamount to ownership; for, as was observed by Sir *John Leach* in *Reith v. Seymour* (e), with reference to *Irwin v. Farrer*, it was required that the power should be exercised; and those cases in truth decide no more than that where no formalities are required to the exercise of a power, any act, however informal, demonstrating an intention to execute it, will be sufficient for that purpose, but that an act must be done. I cannot, therefore, upon the ground which was first suggested, hold that Lady *Wells* had any power to dispose of the trust funds otherwise than by a perfect appointment.

(a) 16 Ves. 135.

(b) Id. 139.

(c) 19 Ves. 86.

(d) 2 Hare, 521.

(e) 4 Russ. 263.

The second ground suggested was, that there was a defective appointment, which a Court of equity would aid. This part of the case was mainly, if not entirely, argued as upon a defective appointment in favour of Sir *John Wells*. It was not indeed insisted, that a husband is one of the favoured objects on whose behalf Courts of equity relieve against the defective execution of powers, (and the case of *Moodie v. Reid* (a) has determined the contrary); but it was contended, that Sir *John Wells*, in this case, was to be considered as a purchaser, upon the ground of the expensive establishment maintained by him, and of the mode in which the legacy of 2000*l.*, given to Lady *Wells*, and not subject to the trusts of the settlement, was dealt with. There seems to me, however, to be no foundation for this argument. I apprehend, that in order to constitute a purchaser in whose favour a defective execution of a power can be aided, there must be consideration, and an intention to purchase, either proved or to be presumed; but the expenditure by a husband of his wife's money in the maintenance of the establishment, does not appear to me to furnish any consideration to the wife; and assuming that the transfer by a husband of his wife's legacy into her name, and the carrying the income of it to her account, might amount to consideration, it certainly does not prove any intention to purchase, nor, I think, having regard to the relation of the parties, lead to the presumption of any such intention; and if it could do so in any case, it could not, I think, in such a case as the present, the findings of the report, to which I have before referred, negating the existence of any such intention.

If, therefore, the case as to the defective appointment had depended upon an appointment in favour of Sir *John Wells*, I should have thought it could not have been main-

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tained; but I think that, independently of any appointment in favour of Sir *John Wells*, there is, to some extent, a case of defective appointment to be aided by a Court of equity. It cannot indeed, I think, be said that there was any defective appointment by Lady *Wells* in her own favour, which the Court could aid; for, if the powers of attorney, and transfers and assignments, executed by Lady *Wells*, were not (as, for the reasons already given, I am satisfied that they were not,) intended as executions of the power of appointment, the placing the funds to her separate account, which for the most part followed upon those acts, could not, it would seem, have been so intended; and, besides, it is, I think, to be inferred, from the proceeds of the funds having been carried to the separate account of Lady *Wells*, that they were considered to be affected by some trust for her separate use, and no such trust existed except the trust created by the settlement; and it cannot therefore be presumed, that there was an intention to execute the power, and thus take the funds wholly out of the trust: and, again, it is difficult to say, that in the case of the exercise of the power by Lady *Wells* in her own favour, there could be any such consideration as could call into action the power of this Court to aid a defective execution, there being no consideration moving to her from any other person.

I think, therefore, that the proceeds of these funds, after they were placed to Lady *Wells*' account with Messrs. *Smith & Co.*, must be considered to have remained subject to the trusts of the settlement; but those proceeds, after they had been placed to Lady *Wells*' account, were, in so far as they were not disposed of in the purchase of the *Bolnore* estate, and of the lease of that estate, and in improvements upon it, applied to other purposes, and, upon the facts found in this report, must, I think, be taken to have been applied to those purposes, and principally



for the current purposes of the establishment, by the order and direction of Lady *Wells*, Sir *John Wells* being her agent in the application of them; and, taking this to have been the case, I think, that, as to the monies so applied, it must be considered that there was a defective appointment, which ought to be aided by this Court. Lady *Wells* had the absolute power over the funds; she could not be justified in applying them to such purposes, otherwise than by an exercise of her power. She received consideration for so applying them; for, although the maintenance of the establishment by a husband would be no consideration for a purchase by him from his wife, it cannot, I think, be said, that if a wife thinks proper to keep up an expensive establishment, against the wishes of her husband, by means of her separate estate, what was supplied for the establishment would be no consideration to her for payments made out of her estate on that account. If the trust funds had been transferred to the trustees, and Lady *Wells* had directed the trustees to apply them in payment of her debts, and they had been so applied, such an application of them must, I think, have been supported in equity in favour of the persons to whom the payments were made, and of the trustees, if attempted to be charged in respect of those payments; and the funds having remained in her name, subject to the trusts, the same rule must, I think, be considered to apply to them as would have applied to them if they had been transferred. The case of *Routledge v. Dorril* (a) supports this view. In that case some of the funds subject to the power were, by the direction of the donee, not, as it would appear, accompanied by the prescribed formalities, transferred to an object of the power; and no doubt seems to have been entertained that the power was well exercised as to the funds so transferred.

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(a) 2 Ves. jun. 357.

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I am of opinion, therefore, that, as to so much of the trust funds as were applied otherwise than in the purchase of the *Bolnore* estate and of the lease of that estate, and of the improvements upon it, it must be held that they were well appointed and disposed of in equity; and that the Plaintiff can maintain no claim in respect of them: but as to the monies laid out in the purchases and improvements, I think the case is different. These monies were derived from the trust. They must continue subject to it, unless they were well alienated from it. They could not be so alienated otherwise than by an exercise of the power. There was no perfect execution of it, and, as to these monies, no consideration to aid a defective execution of it; and if there was a power to give them to Sir *John Wells*, there was no gift of them to him. I think, therefore, that they must be held to have remained subject to the trusts; and that the Plaintiff must have the right to recover them, if they are at all recoverable, which depends upon the third point, the right against the lords of the fee.

Before, however, advertng to this point, it may be right that I should observe upon another most important question, which was discussed in the argument of this case,—to what extent, if at all, the estate of Lady *Wells* could be affected by her acts and conduct. It was argued, on the part of the Defendants, that where a married woman, with a power of appointment over trust funds, has permitted those funds to be received by her husband, neither she nor her appointee could afterwards recal them; and, on the other hand, it was insisted on the part of the Plaintiff, that the right of the wife's appointee could be defeated only by a previous exercise of the power *modo et formâ* prescribed by the instrument creating it. I am not prepared to adopt either of these grounds to the full extent to which it was carried. The argument on the part of the Plaintiff, if adopted to the full extent, would, I think, go

far to contradict what was said by Lord *Hardwicke* in *Ryder v. Bickerton* (a), and by Lord *Eldon* in *Lord Montford v. Lord Cadogan* (b). Those cases, I think, shew that, in the opinion of both those most eminent Judges, the rights of married women might be barred, and their estates affected, by active participation in breaches of trust; and if so, it would seem to follow, that, when, their powers having been exercised by will, the trust funds become their assets, they must be liable for those breaches of trust; but, on the other hand, to hold that the fact of a married woman having permitted her husband to receive the trust funds, would preclude any right to relief by her or her appointee, would be to defeat the very purpose for which the trust was created—the protection of the wife against the husband. It is not, I think, necessary to decide this question in the present case; but whenever it may become necessary to do so, I am much disposed to think the true rule to be adopted will be found to be this—the provisions of the settlement are for the protection of the wife. Full effect must be given to them, and the Court, therefore, before it can hold the estate of the wife to be in any manner affected, must be fully satisfied that the husband has not in any degree influenced the acts or conduct of the wife. If, upon the most jealous investigation, the Court should be satisfied of this, I see no reason why, the wife having been constituted a feme sole by the terms of the settlement, her assets, including the trust funds, which have become her assets by the exercise of her power, should not be bound to the same extent as the assets of any other person not under the disability of coverture would, under the same circumstances, be bound. The modern cases as to the liability of the estates of married women, for their general engagements, seem to me to favour this view; and I think it falls in very much with the opinion of the present Lord Chan-

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(a) 3 Swanst. 80, n.

(b) 19 Ves. 635.

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cellor in *Mara v. Manning* (a). It is not opposed to Lord *Langdale's* opinion in *Kellaway v. Johnson* (b), which is, I think, the nearest case to the present; for, in that case, the acts done were for the benefit of the husband, and there was no proof of the wife's concurrence, except by a deed executed under his influence; nor is it inconsistent with Sir *John Leach's* opinion in *Cocker v. Quayle* (c), any further than that, upon the grounds which I have suggested, it might have been, though it was not, argued in that case, that the dividends, when they accrued due, would have been subject to the indemnity of the trustees; but this argument, had it been advanced, might have been met by the answer, that the protection there was not against the husband merely, but against the wife herself, and that the trustees could not claim indemnity against a protection so strictly reserved to the wife—an argument which cannot be applied to a power of appointment, so long as the exercise of the power renders the fund subject to the liabilities of the appointor. I am much disposed to think, that, had the trust funds been transferred to the trustees, and afterwards dealt with in the manner appearing by this report, Lady *Wells's* estate would, under the very peculiar circumstances of this case, have been liable to the trustees, and that, upon this ground also, had it been necessary to resort to it, the Plaintiff's title to recover for the benefit of her estate could not, to the extent I have mentioned, have been maintained.

With respect to the last question—the right against the lords of the fee—I think it unnecessary to say much upon the subject. It is well settled, that trust monies may be followed into land; and whatever difficulty there might have been in following these monies into the land as against the lords of the fee, is, I think, removed by the

(a) 2 J. & L. 311. (b) 5 Beav. 319. (c) 1 Russ. & My. 535.

Escheat Act (a): and even if it were otherwise, I think that Sir *John Wells*, having been debtor to the trust in respect of these monies, I should, upon the authorities, have been bound to hold—as in the absence of authority I should myself have decided—that the estate in the hands of the lord is liable for the debt.

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(a) Stat. 4 Will 4, c. 23, s. 4.

HUDLESTON v. WHELPDALE.

A QUESTION arose in this cause, as to what directions ought to be given in respect of the past and future renewals of some leases which formed part of the estate of the testator, *John de Whelpdale*.

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Where leases, which the testator had directed to be renewed, were renewed by

adding a cestui que vie, by means of a payment out of funds belonging to the testator's estate (not charged with such renewal), and it was referred to the Master to inquire what security the tenant for life of the leases ought to give, and to what amount, for the contribution which he might be liable to make for the benefit he should derive from the renewal, the Master found, and the Court had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid, in the name of the trustees, on the life of the new cestui que vie, the costs and premiums in respect of which ought to be paid out of the rents and profits of the estate to which the tenant for life was entitled;—

The Court subsequently declared the policy of life insurance to be a security for the benefit which the tenant for life had derived, or might derive, from the renewal, or might have derived therefrom if another proper life had been inserted in lieu of his own.

But, *semble*, the mode of providing the security adopted by the report is erroneous in principle; for the object of the Court, in requiring security to be given by the tenant for life in respect of the benefit which he may derive from the renewal of the lease, is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive; and the security therefore is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of; and this sum (which would be payable on the death of the tenant for life) is not properly secured by a policy of insurance on the life of another person, inasmuch as it throws upon the remainderman not merely the interest of the capital provided, but the burthen of keeping up a policy of life insurance for the full amount; and it is mere speculation whether this burthen will be compensated by giving him the benefit of a policy at a less rate of premium, owing to an earlier insurance of the life.

Although it may be, that, when provision is made of a fund for renewal, the remainderman will not suffer, this is not the principle, for the principle is, that the remainderman ought to bear so much of the capital paid for renewal as may not be paid by the tenant for life under the security which he has given.

The Court will not retain the income of the tenant for life, because he may become liable to give security for the payments on account of renewals, before the occasion for giving such security has arisen.

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*John de Whelpdale*, the testator, was, at the date of his will and the time of his death, entitled to the rectory of *Penrith*, with the tithes thereto belonging, under a lease granted by the Bishop of *Carlisle* for the lives of the testator *T. D. Bleagmire* and *Sarah Spedding*; and he was also entitled to some closes of land, held under a lease for twenty-one years, also granted by the Bishop of *Carlisle*, and usually renewed every seven years upon payment of a fine; and by his will, dated the 14th of September, 1843, he appointed *A. F. Hudleston* and *T. D. Bleagmire* his trustees; and bequeathed to his wife, *Mary de Whelpdale*, the whole of his personal estate and effects, except his leasehold property under existing leases, subject to his debts and funeral expenses; and the testator devised to his trustees all his real property and landed estates and houses, freehold, copyhold, customary, or leasehold, whether for lives or years, without impeachment for waste or involuntary loss, and in trust that his said wife might and should, during her life, receive the full rents and profits accruing and arising therefrom, through the assistance of his two trustees; and that they would see to the regular renewals, and to the discharge of the lawful fines and legal expenses attending and incident upon such existing leases, be the same for lives or for years as cases might happen and occur; and that all legal expenses should be defrayed by his said wife out of the rents and profits and bequests under that his will, in the same and like manner as had theretofore been always done by him the testator; and he thereof appointed his said wife residuary legatee; and after the decease of his wife he devised his real property, estates and houses, together with all his leasehold, freehold, copyhold, and customary estates, as before described, unto his trustees, in trust that they would see to the due administration and execution, according to the true intent of his will, and without impeachment of waste, to preserve contingent remainders thereafter mentioned, that is to say,

to the use of *Walter Hutchinson Whelpdale*, third and youngest son of *Andrew Whelpdale*, without committing waste, for his life; and, after his decease, to the use of the first, second, third, fourth, and all and any other son and sons of the said *Walter Hutchinson Whelpdale* successively in remainder and in tail one after the other in priority of birth, and to the respective heirs of all and any of such sons, the elder of such sons and the heirs of his body male to be preferred before the younger; and in default of such issue male, then to the use of *Andrew Whelpdale*, deceased, and to the son and sons of his body. And the testator declared that his trustees should be allowed all expenses legally issuing and accruing: first, by his wife, out of the rents and profits arising from his real property during her life; and, after her decease, by the person next to succeed under his will.

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The testator died in March, 1844; and soon after his death a new lease of the rectory and tithes, dated the 26th of October, 1844, was granted by the Bishop to the trustees of the will, for the lives of *T. D. Bleagmire* and *Sarah Spedding* (the two surviving cestuis que vies under the old lease), and the said *Walter Hutchinson Whelpdale*, and the life of the longest liver of them; and a new lease of the closes of land, dated the 3rd of December, 1844, was also granted by the Bishop to the trustees for a fresh term of twenty-one years, the first seven years of the former term being expired.

The fines and fees incident to these renewals were paid by *Mary de Whelpdale*, and no claim was made on the part of her estate in respect of those payments. *Mary de Whelpdale* died on the 6th of May, 1848.

The suit was instituted by the trustees under the will of *John de Whelpdale*, who were also the executors of *Mary de*

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*Whelpdale*, for the administration of the testator's estate. The decree of the 25th of July, 1849, amongst other things, directed the Master to inquire what leasehold property or estates for lives or years the testator died seised or possessed of, and whether the same were renewable, and whether any leases of any and what part of such property had at any time and when and for what periods been renewed and by whom, and what sum or sums of money had been paid and by whom for fines and for legal and other expenses or otherwise in respect of such renewals, and out of what funds; but the inquiry was to be without prejudice to the question as to whom such fines and expenses ought to be borne by, and whether any provision ought to be made for the future renewal of any and which of such leases.

The Master, by his separate report, dated the 28th of March, 1850, found that, since the lease for lives of the 26th of October, 1844, was granted, and since the decease of *Mary de Whelpdale, Sarah Spedding*, one of the lives named therein, had died, and that no renewal of the lease had then been obtained for the lives of the survivors and of another person in the place of *Sarah Spedding*; and that the Bishop, about twelve months previously, upon the death of *Sarah Spedding*, required the sum of 1748*l.* 12*s.* 8*d.* to be paid to him by way of fine for putting in a new life in her place, besides the costs and charges for a new lease; that the Plaintiff, *T. D. Bleagmire*, by his affidavit, had deposed, that he believed it would be for the advantage of the parties beneficially interested in the estate that a new life should be added to the lease in the place of *Sarah Spedding*, and that without further loss of time, inasmuch as it was probable that the Bishop would increase the amount of fine required for the renewal of the lease by reason of delay; and that, if either of the two remaining lives in the lease should lapse before the lease was re-



newed, the Bishop would either claim a very large sum for putting in two fresh lives or might refuse to grant a renewal of the lease altogether. And the Master found, that, since the death of the testator, the sum of 200*l.* had been retained year by year out of the rents and profits of the real estate, and been invested in the purchase of Consols: as to part thereof, in the name of *Mary de Whelpdale* and the Plaintiffs; and as to other part thereof, in the names of the Plaintiffs alone, to form an accumulating fund for the purpose of defraying the fines and fees of, and attending the future renewals of, the leases as occasion might require.

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By an order, dated the 4th of May, 1850, made upon the petition of the Plaintiffs, the report of the 28th of March, 1850, was confirmed; and the Court declared, that *John de Whelpdale*, the testator, had by his will declared that the said leases should be renewed according to the usual course and custom of the see of *Carlisle*; and that the testator had not thereby charged the fines and expenses payable for obtaining such renewals after the death of his widow *Mary de Whelpdale*, upon any tenant for life of the property comprised in the leases; and it was referred to the Master, to inquire and state what was the proper amount required for fines and fees to obtain a renewal of such of the said leases as was or were then renewable, and in what manner and out of what fund the same ought to be raised and paid; and also to approve of a proper person as a life to be put in the stead of *Sarah Spedding*, and to inquire what security, if any, and to what amount (having regard to what the Defendant *Walter Hutchinson Whelpdale*, the tenant for life, might have to contribute to the said amount so to be raised and paid,) ought to be given by the said Defendant for the contribution which he might be liable to make for such benefit as he should derive from such renewals; and in making these

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inquiries, regard was to be had to the declaration thereinbefore contained; with liberty to state special circumstances.

In pursuance of this order, a further separate report, dated the 9th of July, 1850, was made, whereby it was found that the sum of 1788*l.* 5*s.* 7*d.* was the proper amount required for fines and fees to obtain a renewal of the lease of the rectory, then renewable; and that the same ought to be raised by sale of a competent part of the sum of 2451*l.* 19*s.* 1*d.* Consols, standing to an account "*Ex parte The Lancaster and Carlisle Railway Company*: The account of the trustees of the will of *John de Whelpdale*," which had arisen from the sale to that Company of part of the real estate of the testator; without prejudice to any question out of what fund the fines and fees ought ultimately to be paid; and that *Mary Ann*, the wife of *James Holmes Nicholson*, was a proper person as a life to be put in the stead of *Sarah Spedding*; and, under an order, dated the 20th of July, 1850, so much of the 2451*l.* 19*s.* 1*d.* Consols, as would raise the sum of 1788*l.* 5*s.* 7*d.* was sold, and the produce applied in payment of the fine and fees for the renewal of the leases.

The Master afterwards, proceeding under the order of the 4th of May, 1850, made a further separate report, dated in January, 1851, whereby he found, that, in pursuance of his report of the 9th of July, 1850, and the order of the 20th of July, 1850, the 1788*l.* 5*s.* 7*d.* had been paid for the renewal of the lease; and that *Mary Ann Nicholson* had been put in as a life instead of *Sarah Spedding*, by an indenture of lease, dated the 21st of September, 1850, made between the Bishop of *Carlisle* of the one part, and the Plaintiffs of the other part; and he was of opinion (having regard to the declaration contained in the said order) that the 1788*l.* 5*s.* 7*d.* ought to be secured,

to be repaid upon the decease of *Mary Ann Nicholson*; and that, for the purpose of securing the repayment thereof, an insurance in a substantial Life Insurance Office ought to be effected for the payment of that amount upon her decease; and that the costs of effecting such insurance and the annual premiums or other payments necessary for keeping the same on foot, ought to be paid out of the rents and profits of the estates in question in this cause; by means whereof the Defendant, *Walter Hutchinson Whelpdale*, would, during his life, contribute the annual income which would otherwise have been payable to him from the fund, out of which the 1788*l.* 5*s.* 7*d.* had been raised and paid; and also, in case *Mary Ann Nicholson* should die in his lifetime, would have contributed the whole of the sum of 1788*l.* 5*s.* 7*d.* upon her decease; and also, in case *Mary Ann Nicholson* should survive him, would have contributed by the payment of the annual premiums out of the rents during his life, such a proportion of the 1788*l.* 5*s.* 7*d.* as the length of his life should have borne to the length of the life of *Mary Ann Nicholson*; and that the effecting such life insurance in the names of the Plaintiffs, as the trustees for the renewal of the lease, and the payment of the premiums payable in respect thereof out of the rents and profits of the estates, would afford an ample security for what the Defendant, *Walter Hutchinson Whelpdale*, might have to contribute towards the 1788*l.* 5*s.* 7*d.* The Master then stated, that the Monarch Life Assurance Company had been proposed to him as a responsible Company, and he had allowed the proposal; and he was of opinion (having regard to the declaration contained in the said order) that an assurance should be forthwith effected with the Monarch Life Assurance Company, for the payment to the Plaintiffs, their executors, &c., as trustees for the renewal of the lease of the rectory, of the sum of 1788*l.* 5*s.* 7*d.*, upon the decease of *Mary Ann Nicholson*; and that the costs of effecting

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such insurance, and also of the annual premiums or other payments necessary for keeping the same on foot, should be paid out of the rents and profits of the estates in question in this cause; and that, during the life of the Defendant *Walter Hutchinson WHELPDALE*, such premiums or other payments should be paid by the receiver in the cause.

By an order of the 1st of March, 1851, the Master's separate report, of the 29th of January, 1851, was confirmed; and it was ordered that the Plaintiffs should be at liberty forthwith to effect an insurance with the Monarch Life Assurance Company for payment to the Plaintiffs, their executors, &c., as trustees as aforesaid, of the sum of 1788*l.* 5*s.* 7*d.*, upon the decease of *Mary Ann Nicholson*, the policy for such insurance to be in the form therein referred to; and that the costs of effecting such insurance, and also of the annual premiums and other payments necessary for keeping the same on foot, should be paid out of the rents and profits of the estates in question in the cause; and that the receiver should pay the same out of such rents and profits.

The Master having subsequently made his general report (referring to his separate report of the 27th of March, 1850), the cause came on for further directions.

*Argument.*  
 ———

Mr. *Russell*, Mr. *Rolt*, Mr. *Willcock*, Mr. *Speed*, and Mr. *Schwym*, appeared for the different parties.

VICE-CHANCELLOR:—

*Judgment.*  
 ———

In determining this case, it is necessary, I think, in the first place to consider what are the points in the cause

which are open for present adjudication; for, upon examining the decree, reports, and orders, it will, I think, be found that nearly all the questions as to the renewal of these leaseholds, which have yet arisen under the will of this testator, have been already disposed of; and that there is little left for the Court now to determine, consistently with its general rule, that questions are to be decided as they arise, and not by anticipation. No claim being made in respect of the fines and fees paid upon the renewals by *Mary de Whelpdale*, there is no question now arising under the inquiries directed by the decree, as to the past fines and expenses; and as to the 1788*l.* 5*s.* 7*d.*, paid upon the renewal under the order of the Court, I think that (whatever my opinion might have been upon the subject) the order of March, 1851, confirming the report of January, 1851, concludes the question as to the security which ought to be given by *Walter Hutchinson Whelpdale*, for the contribution he may be liable to make for the benefit he may derive from that renewal; for I think that report must be taken to have been made with reference to so much of the order of the 4th of May, 1850, as had not been exhausted by the previous reports, namely, the question of the security which *Walter Hutchinson Whelpdale* ought to give. I think however, that neither the report of January, nor the order of March, 1851, concludes the question how the 1788*l.* 5*s.* 7*d.* ought ultimately to be paid, for this question was expressly reserved by the report of the 9th of July, 1850, and therefore by the order of the 20th of July, 1850, confirming that report; and the report of January, 1851, finds no more than that the sum in question ought to be secured by insurance, thus leaving open the question how it ought to be paid.

In cases of this nature, the first point to be considered

Different cases  
in which ques-  
tions arise as

to the burden and benefit of renewals of leases made by or on behalf of parties having limited interests in the demised property.

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—  
Judgment.

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 —  
*Judgment.*

is—what are the provisions of the instrument by which the leaseholds are settled,—whether they prescribe renewal expressly or by implication,—and if so, whether they point out the mode by which the expenses of the renewal are to be paid; for property of this description may no doubt be given in such a mode as to indicate that it was not intended to impose any obligation to renew; and of course the donor or settlor may so model his disposition as to throw the expense of renewal upon all or any of the persons in whose favour the limitations of the estate are created, as he may think fit. If, upon the examination of the instrument by which the leaseholds are settled, it appears that no obligation to renew was intended to be imposed, no further question arises, except in cases in which the party taking the estate, although under no obligation to do so, thinks proper to renew; and his interest being limited, this Court attaches an equity upon the renewal, and then it falls to be considered what are the obligations attaching upon the party claiming the benefit of such an equity in favour of the party by whom the renewal has been effected. If the instrument by which the leaseholds have been settled imposes the obligation to renew, and points out the mode by which the expenses of the renewal are to be paid, that mode necessarily prescribes the obligations which were intended to be imposed upon the parties claiming under the instrument, and must be followed accordingly. If the instrument imposes the obligation to renew, and does not point out the mode in which the expenses of the renewal are to be paid, the Court must determine the mode; and the question arises, what is the rule of the Court upon the subject?

In the present case, the order of the 4th of May, 1850, has, I think, settled under which of the foregoing classes the case is to be ranked; for it has declared that the testator has directed the leases to be renewed, and that he

has not charged the fines and expenses upon any tenant for life of the property comprised in the leases; and upon examining the will, I see no ground whatever to hold that they are charged upon any other person or property. The case, therefore, is one in which it is for the Court to determine how, independently of any directions contained in the will, the fines and fees are to be paid.

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*Judgment.*

Payments of this nature being required to be made immediately, and in an aggregate sum, and the obligation to renew rendering it necessary that they should be made, trustees when they have had the power to do so, and the Courts when applied to, have been compelled to resort to any property available for the purpose of meeting such payments; and accordingly the amounts required have generally been raised by mortgage, and in the present case have been provided out of funds in Court, which formed part of the corpus of the testator's estate; but it is obvious that the obligations of the parties may not correspond with their rights in the property thus adventitiously resorted to, and that the equity between the parties could not therefore rest upon that footing, but must be settled upon some other basis.

The first and most obvious equity is this: that, where the estate is limited for life, with remainders over, and the fines are raised by mortgage, the tenant for life should keep down the interest of the mortgage, the payment out of the corpus being for the benefit of all the parties; and accordingly this rule has, I believe, at all times prevailed: but this rule was evidently insufficient to meet the justice of the case. For instance, if the lease was renewed, and

A rule, that the obligation of the tenant for life of property subject to fines for renewal, is satisfied by keeping down the interest only of the amount necessary to be paid for the renewal, would be un-

just if the tenant for life survived the first *cestui qui vie*, and a second renewal was necessary in his lifetime, for then the tenant for life would have had the whole benefit of the first renewal; and the rule therefore is, that the tenant for life is bound, not only to bear the interest of the sum paid for the renewal, but to contribute towards the payment of such sum.

A rule, which attributed one third of the expense of renewal to the tenant for life, and two thirds to the parties in remainder, would not remove the injustice; and therefore the Court holds that the amount of contributions of the tenant for life and remainderman are to be determined by the amount of the benefit which they respectively derive from the renewal.

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 Judgment.

the fine raised by mortgage, and the tenant for life survived all the cestuis que vies in the renewed lease, and the lease was then again renewed, the estate would go to the remainderman charged with the mortgage created on the first renewal; but the whole benefit of that renewal would have been enjoyed by the tenant for life. The tenant for life therefore was held liable to contribute to the payment of the fine, in addition to the obligation of keeping down the interest on the mortgage. It then became a question to what extent he should contribute? and the old rule of the Court appears to have been, that he should contribute one-third, the remainderman paying two-thirds: the Court in this respect adopting what was formerly the rule of the Court as to mortgages. But this, as observed by Lord Eldon in *White v. White* (a), was applying a rule as to another species of estate, "distinct in the very point that furnished the rule" (b), and it was calculated to palliate only, and not to remove, the injustice which led to its introduction; and the Court therefore has now adopted the sounder rule, which I take to be well settled by the more modern authorities, that, in these cases, tenants for life and remaindermen are to contribute in proportion to the benefits which they derive from the renewal.

This rule, however, although most just in principle, is attended with manifest inconvenience. It is impossible, from the nature of the case, to foresee, at the time when the renewal is effected, to what extent the tenants for life and remaindermen respectively will benefit by the renewal, and, therefore, in what proportions they ought to contribute to the fines. The tenants for life may outlive all the cestuis que vies, and thus get the whole benefit of the renewed lease, or they may die before they get any benefit from it. The Court has been at all times embarrassed with

(a) 9 Ves. 554.

(b) Id. 560.



the difficulty which this state of circumstances creates; and from this difficulty has arisen the further rule, which is so well expounded in *Jones v. Jones (a)*, that the tenant for life is to give security for the benefit which he may derive from the renewal. It still, however, remains to be determined what the security is to be. In the present case, I do not feel myself at liberty to determine the point. As to future renewals, it would, I think, be going beyond the rule of the Court, to make any declaration respecting them; and as to the security in respect of the 1788*l.* 5*s.* 7*d.*, I consider the question, as I have already observed, to be concluded by the order confirming the report of January, 1851.

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 —  
*Judgment.*

So much, however, was said at the bar upon the subject of that report, that I feel bound to say, that, as at present advised, I do not see my way to the principle on which it is founded, and that it seems to me to proceed altogether upon an erroneous footing. The Master seems to have been looking to a fund being provided for future renewals; but what he was required to do was, to find what security ought to be given for the benefit which might be derived by the tenant for life from the then intended renewal. The object of the Court in these cases is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive; and the security, therefore, is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of, leaving the rest to be borne by the parties who may succeed him; and it is difficult to see how, when this amount would be payable on the death of the tenant for life, a policy of insurance on the life of another person could be a proper security for it. It may, indeed, be said, that if a fund be provided for the renewal, the remainderman would not suffer; but this is not the principle on which the order of re-

(a) 5 Hare, 440. See pp. 465 et seq.

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 —  
*Judgment.*

ference to the Master was made, nor, so far as I am aware, a principle on which the Court has ever acted; and it is, in my opinion, at least open to very grave doubt, whether it is a principle on which the Court ought to act. What the remainderman ought to bear, is so much of the capital paid for the renewal as may not be repaid by the tenant for life, under the security which he has given, in respect of the benefit he has derived; but the principle adopted by this report, would throw upon him, not merely the interest of the whole capital, but the burthen of keeping up a policy for the full amount. It was said too, that the remainderman would himself be bound to give security, and that he would have the benefit of a policy at a less rate of premium, in consequence of the early insurance of the life; but whether this advantage would countervail the additional burthen which might fall upon him, would be mere matter of speculation. There has been, I suspect, in this case, some misunderstanding of the case of *Greenwood v. Evans* (a). The policy of insurance in that case does not appear to have been the security given by the tenant for life for the benefit which he might derive from the renewal, but a policy effected by the trustees for the purpose of providing for future renewals, and the inquiry as to keeping it on foot and effecting new policies was by consent.

Under the circumstances of the present case, all that I can do with the policy is to declare it to be a security for the benefit which the Defendant *Walter Hutchinson Whelpdale* has derived or may derive from the renewal, or would have derived therefrom if another proper life had been inserted in lieu of his own life; for I think there is nothing in this case to warrant his position being altered by his own life having been inserted. In *White v. White* (b), it was indeed held, that the position of the tenant for life

(a) 4 Beav. 44.

(b) See 9 Ves. 561.

might be thus altered, but the decision went upon the special terms of the will.

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 Judgment.

It appears by the reports that the trustees have retained some rents which accrued due in the lifetime of *Mary de Whelpdale*, and some which have accrued due since her decease. As to the former, it was argued, on the part of the Defendants, that they ought to be considered as having been appropriated to future renewals; but I see nothing in the case which can justify such a conclusion; and I think, therefore, that these rents must be paid over to the Plaintiffs, as the executors of *Mary de Whelpdale*. As to the rents accrued due since her death, and retained by the trustees, I think they must be paid over to the receiver. The security required in respect of the past renewal having been approved by the Court, there is no ground for retaining them on that account; and I think they cannot be retained on account of the security which may hereafter become necessary in respect of future renewals. To retain the income of a tenant for life, because he may become liable to give security before the occasion for giving it has arisen, would, I think, be going beyond what would be warranted either by authority or principle.

My order therefore as to the fines must be, to declare that the several parties interested under the will of the testator in the leasehold premises thereby devised and bequeathed, ought to have contributed and ought to contribute to the fines, fees, and expenses, payable upon the renewals of the leases under which such premises are held, in proportion to the benefits which they have respectively derived, and may respectively derive, from such renewal; and in particular that the Defendant, *Walter Hutchinson Whelpdale*, ought to contribute to the 1788*l*. 5*s*. 7*d*., appearing by the report of January, 1851, to have been paid for the fines and expenses of and incident to the renewal

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of the lease of the rectory and tithes, in proportion to the benefit he has derived and may derive from such renewal, or might have derived therefrom, if, upon such renewal, another proper life had been inserted in the lease in lieu of his own life; and to declare that the policy of insurance ought to be held as a security for what it may ultimately appear the said Defendant *Walter Hutchinson Whelpdale* ought so to contribute.

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 Nov. 11th &  
 12th.

1852.  
 May 21st &  
 24th

The clerk of a solicitor, who was the solicitor of the mortgagor and mortgagee in the creation of the security,—and who copied the bill of costs of the solicitor in the transaction of making an appointment of the estate comprised in the security, and of preparing the mortgage deed, which was founded on the title created by the appointment,—may be received as a witness to depose to the handwriting on

the document (which proof alone does not make it evidence); but he cannot be received to depose further as to the contents of the bill of costs, or the subject to which it relates, for an attorney's bill of costs is his history of the transaction; and the attorney could not be himself permitted to give evidence of the transaction against his client, or against those claiming under his client.

The consent of the personal representative of the mortgagor, who was one of the clients of the solicitor, to the admission of the bill of costs in evidence, does not make it evidence which can be admitted against the parties claiming under the mortgagee, the other client.

Communications with the solicitor of the mortgagor only, or with the solicitor of persons having interests in the mortgaged estate in default of appointment, such solicitor not being the solicitor of the mortgagee, are not privileged communications when tendered as evidence in a suit to impeach the mortgage security as having been founded on an appointment made in fraud of the power.

### CHANT v. BROWN.

A MOTION to suppress the depositions of *William Thorne* to the fifth interrogatory, and of *Philip Hancock* and *James Clotworthy* to the twelfth interrogatory, upon the ground that the evidence given by the witnesses in answer to the interrogatories was in breach of professional confidence.

The bill was filed by Mr. and Mrs. *Chant*(a), Mrs. *Chant* being one of the children of *Edward Melton*, for the purpose of setting aside an appointment made by *Edward Melton* in favour of *Mary Melton*, another of his children, and a mortgage made by *Edward Melton* and *Mary Melton* to *John Timewell* for securing 4600*l.* The case made by the bill was, that *Edward Melton* had a power of appointment in favour of any one or more of his children over the *Westhill* estate, which, in default of appoint-

(a) See *Chant v. Brown*, 7 Hare, 79.

ment, was limited to all the children; that *Edward Melton* appointed the estate to *Mary*, and that she then concurred with him in the mortgage of the estate to *Timewell*; that the 4600*l.*, the mortgage money, was received by *Edward Melton*, and applied for his benefit; that the appointment was a fraud upon the power, and that *Timewell* had notice of the fraud. And the bill charged that *Augustus Pulsford Brown*, who is a Defendant to the bill, was the solicitor of *Melton* in the transaction of the appointment, and of *Melton* and *Timewell* in the transaction of the mortgage; and that he received the 4600*l.*, and applied it for the benefit of *Edward Melton*.

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 Statement.

The bill alleged that *Timewell* had died, having by his will disposed of his property upon trusts for the benefit of *Mary*, the wife of *Augustus Pulsford Brown*, and her children, all of whom, together with the personal representatives of *Timewell* and of *Edward Melton*, and the other children of *Edward Melton*, were Defendants to the suit.

The deposition of *Thorne* to the fifth interrogatory was, that the document or bill of costs then produced and shewn to him, marked N., was in his handwriting; that it was written by him by the direction and as the clerk of *Augustus Pulsford Brown*, and he (witness) had no doubt but that he copied it from a draft bill of costs, made out from the attendance-book of the Defendant, *Augustus Pulsford Brown*; but whether he (the witness) or the Defendant *Augustus Pulsford Brown* prepared the draft, he (the witness) was unable to say. He had no doubt but that the exhibit N., was written for the purpose of being sent to *Edward Melton*; but he could not speak to the fact of its having been sent or delivered to him, or of its having been paid or settled in account.

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 v.  
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 —  
*Statement.*

The witnesses, *Clotworthy* and *Hancock*, by their depositions to the twelfth interrogatory, proved exhibits marked K., L., and M., which were cases prepared for the opinion of counsel, one on behalf of *Edward Melton*, and others on behalf of several of his children, who would have been interested in the mortgaged estate in default of appointment by him.

The motion was made on behalf of the Defendants, the *Browns*, claiming under the will of *Timewell*.

*Argument.*  
 —

Mr. *Rolt* and Mr. *Bird* for the Defendants, the *Browns*; and

Mr. *Follett* and Mr. *Druce* for other Defendants.

Mr. *Butt* and Mr. *Dickenson*, for the Plaintiffs, opposed the motion.

In support of the motion to suppress the depositions, the following cases were cited: *Herring v. Cloberry* (a), *Jones v. Pugh* (b), *Carpmael v. Powis* (c), *Reece v. Trye* (d), *Wilson v. Rastall* (e), *Parkhurst v. Lowten* (f), *Greenough v. Gaskell* (g), *Ex parte Horsfall* (h), *Doe d. Shellard v. Harris* (i), *Robson v. Kemp* (k), *Beard v. Ackerman* (l); and in support of the proposition, that the rule extended as well to the clerk of the attorney as to the attorney himself, *Taylor v. Forster* (m); and that the same had been held with regard to the clerk of a counsel, *Foot v. Hayne* (n).

- (a) 1 Ph. 91
- (b) 1 Id. 96.
- (c) Id. 687.
- (d) 9 Beav. 316.
- (e) 4 T. R. 753, 759.
- (f) 3 Madd. 121.
- (g) 1 My. & K. 98

- (h) 7 B. & C. 528.
- (i) 5 Car. & P. 592.
- (k) 5 Esp. 52.
- (l) Id. 120.
- (m) 2 Car. & P. 195.
- (n) R. & M. 165.

On the other side, in favour of the admission of the evidence, the following authorities were referred to: *Bricheno v. Thorp* (a), *Sandford v. Remington* (b), *Brickell v. Hulse* (c), *Blenkinsopp v. Blenkinsopp* (d), *Reynell v. Sprye* (e), *Follett v. Jefferyes* (f), *Levy v. Pope* (g), *Bevan v. Waters* (h), *Meyer v. Sefton* (i). It was contended also, that the objection was not tenable when made in favour of the Defendants, who merely represented the original mortgagee: *Doe d. Earl of Egremont v. Date* (k). It had been held, that an attorney's clerk was not privileged from answering whether he had received a particular paper from his client: *Eicke v. Nokes* (l). And the evidence of these witnesses was only put in to prove a similar fact, that a document of a certain description was made out by the solicitor, for the purpose of being delivered to his client.

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Argument.

The VICE-CHANCELLOR, (after stating the position of the parties in the suit):—

Judgment.

The document N. referred to in the deposition of the witness *Thorne* to the fifth interrogatory, is the bill of costs of *Brown* against *Melton*, with reference, amongst other things, to the appointment and the mortgage. The question is, whether the deposition of this witness to the fifth interrogatory ought to be received in evidence against the Defendants, the *Browns*. I am of opinion that it ought not, except to the extent of proof of the handwriting. I think that the evidence cannot be used beyond that extent, and that the document N. cannot be put in upon it. The evidence is tendered for the purpose of impeaching the title of *Timewell*, whose title is

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|--------------------------------|-------------------|
| (a) Jac. 300.                  | (g) M. & M. 410.  |
| (b) 2 Ves. jun. 189.           | (h) Id. 235.      |
| (c) 7 A. & E. 454.             | (i) 2 Stark. 274. |
| (d) 2 Ph. 607; 12 Beav. 568.   | (k) 3 Q. B. 609.  |
| (e) 10 Beav. 51; 11 Beav. 618. | (l) M. & M. 303.  |
| (f) 1 Sim., N. S., 3.          |                   |

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 —  
*Judgment.*

under the mortgage, and rests upon the appointment; and if *Brown* had been proposed to be examined as to the matters contained in the document, I think that his evidence could not have been received against the parties claiming under *Timewell*. The appointment and the mortgage were one transaction, and *Brown* was solicitor of *Timewell* in the mortgage transaction. It appears, on the face of the depositions, that the witness was the clerk of *Brown*, and prepared the document N. in that capacity; and I think the same rule which would have applied to *Brown*, might be applied to the witness. An attorney's bill of costs is, in truth, his history of the transactions in which he has been concerned; and if he cannot be called to prove the facts, I think his clerk cannot be called to prove the history of them.

It was urged in argument, that, the document being produced, the Court had nothing to do with the source from which it was derived; but the answer to this argument is, that the deposition discloses the source from which the knowledge of the witness is derived. It was also attempted to support the evidence, upon the ground that the personal representative of *Melton* did not object to the admissibility of the document; but it does not appear that the document was ever delivered to *Melton*; and if it was, I do not see how it could be made evidence against those claiming under *Timewell* by the consent of *Melton's* representative. I think, therefore, that this deposition must be suppressed, except so far as it proves the handwriting of the witness, which is immaterial.

The other part of the motion, as to the depositions of *Handcock* and *Clotworthy* to the twelfth interrogatory, renders it necessary to go further back into the facts of the case. It appears, that, in the year 1827, it was proposed to raise a sum of money upon the security of the *Westhill*



estate; and a case, of which the document marked L., mentioned in the answer of these witnesses to this interrogatory, seems to have been the draft, was prepared on the part of *Edward Melton* for the purpose of obtaining the opinion of counsel upon the question, whether a good security could be made for the money. This draft was prepared in the office of Mr. *Handcock*, now deceased, who was then the solicitor of *Edward Melton*, and the witnesses *Handcock* and *Clotworthy* were clerks in his office, who assisted in preparing the draft. A sum of 1300*l.* seems to have been raised upon the security, and paid off out of the monies borrowed from *Timewell*; but this money was not raised under any exercise of the power of appointment. In the year 1849 an abstract of the settlement, being the document marked K., also mentioned in the answer of these witnesses to this interrogatory, was made in the office of the witness *Handcock*, who had then succeeded to the late Mr. *Handcock's* business; and this document was prepared on the part of Mrs. *Bult*, another of the children of *Edward Melton*, and a Defendant to the suit, for the purpose of ascertaining her rights under the settlement, and it was copied from the document marked L. Afterwards, in the year 1841, another case, being the document marked M., also mentioned in the answer of these witnesses to this interrogatory, was prepared in the office of the witness *Handcock*, on the part of the Plaintiffs and of Mrs. *Bult* and *Richard Melton*, another of the children of *Edward Melton*, for the purpose of ascertaining their rights; and this case was also copied from the document marked L., and other documents then in the office of Mr. *Handcock*. The evidence of the witnesses *Handcock* and *Clotworthy* in part applies to these documents; and the same objection was made to its admissibility as was made to the evidence of *Thorne*; but the position of the case, with reference to these wit-

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 Judgment.

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 BROWN.  
 Judgment.

nesses, is wholly different, and I think the objection cannot be maintained. *Handcock*, whose clerks these witnesses were, was, as to the document L, the solicitor of *Edward Melton*, and neither his representative, nor any of the other appointees, (if indeed the objection could be raised by them, which I do not think it could,) object to the evidence. There was not, as to the document L, any professional confidence between *Handcock* and *Timewell*; nor does there appear to have been any between him and *Withcombe*, from whom the 1300*l.* was raised. And, as to the documents K. and M., the case is even more clear; for these documents were prepared for parties who are Defendants to the suit, and raise no objection to the evidence. I am of opinion, therefore, that this part of the motion must be refused.

April 30th &  
 May 1st.

Gift by the testator to his wife, for her life, or until her second marriage, of the interest of his real and personal estate, which, whether arising from

#### LACHLAN v. REYNOLDS.

THE testator, *J. G. Wilson*, gave and bequeathed unto his wife *Elizabeth* the use of all his furniture, and property of the like description, for her life (she nevertheless signing and depositing an inventory thereof with his other executors); and from and after the decease or second marriage of his wife, he gave and bequeathed the said rents or public securities, was to be applied for the benefit of herself and children; and if she married again, he declared that her power and benefit under his will should cease; and when thirty years were expired, he ordered all his property, both freehold and leasehold, to be sold, and two thirds to be divided amongst his children living at that period or to their heirs, and one third to be invested for the benefit of his wife; and after her decease, he bequeathed such third to his children then living and to their heirs:—*Held*, that the gift at the end of thirty years was not liable to objection on the ground of remoteness; that there was no substitution of the legatee created by the gift to the children “or to their heirs,” but that the word “or” must be read “and;” and that the children of the testator living at the end of thirty years (who were also the same children as were living at the death of the widow) were entitled to the proceeds of the sale of the estate, and also to the intermediate rents after the death of the widow and before the expiration of the thirty years.

furniture, and property of the like description, unto and amongst such of his children as should be living at the time of the decease or second marriage of his wife, equally to be divided between them, share and share alike; and in case any of his said children should be then dead, after having attained the age of twenty-one and leaving issue, he directed that such issue should take their parents' share of and in the said furniture and property. And he gave and bequeathed unto his wife during her life, and until her second marriage, the interest of any real and personal estates, which money, either arising from rents or from public securities, was to be applied to the benefit of herself and children; and he particularly enjoined her to be very frugal, as there was a large family to support and educate. If she married after his decease, he thereby deprived her of all power, and declared that every benefit arising from his will should immediately cease, and altogether become null and void, so far as concerned her; and, when thirty years were expired, he directed that his executors should order all his property, both freehold and leasehold, to be sold, and two-thirds thereof to be divided amongst his children that were living at that period, or to their heirs; the other third was to be invested in the public funds for the benefit of his wife, if she had not entered into matrimony since his decease. The benefit he intended her was the interest of the money; and after her decease he gave and bequeathed the aforesaid one-third to such of his children as should then be living, and to their heirs.

On further directions and exceptions to the Master's Report—

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Mr. Rolt, Mr. Campbell, Mr. Craig, and Mr. Sidebottom appeared for the several parties interested under the will.

1852.  
LACHLAN  
V.  
REYNOLDS.  
Statement.

Argument.  
—

1852.  
 LACHLAN  
 v.  
 REYNOLDS.  
 Argument.

The cases of *Richardson v. Spragg* (a), *Read v. Snell* (b), *Horridge v. Ferguson* (c), *Parkin v. Knight* (d), *Girdlestone v. Doe* (e), *Wilson v. Eden* (f), *Price v. Lockley* (g), *Gittings v. M'Dermott* (h), *Wright v. Wright* (i), and *Genery v. Fitzgerald* (k), were cited.

VICE-CHANCELLOR:—

Judgment.

Several questions of construction have been raised on this very obscure will. It is contended, first, that, the testator having directed his property to be sold at the end of thirty years, and two-thirds of it to be divided amongst his children living at that period, or their heirs, the gift is void for remoteness. It appears to me, that this amounts to no more than a gift to such of several persons who may be living at the death of the testator as shall be living at the end of thirty years. The legacies are vested at the termination of a life in being at the death of the testator, and they are not, therefore, liable to any objection on the ground of remoteness.

The next question is, who, under this bequest, will take under the words "children living at that period, or to their heirs?" In this case the word "or" must be read "and;" and as the words cannot be construed as referring to the heirs of living persons or the next of kin of living persons, I must take the meaning to be, the children living at the period mentioned, their executors and administrators. This construction is confirmed by the terms of the ultimate bequest, whereby the testator gives the other third part of the property, after the decease of his wife,

(a) 1 P. Wms. 434.

(b) 2 Atk. 643.

(c) Jac. 583.

(d) 15 Sim. 83.

(e) 2 Sim. 225.

(f) 11 Beav. 289, 296.

(g) 6 Beav. 180.

(h) 2 My. & K. 69.

(i) 1 Ves. 409.

(k) Jac. 468.

"to such of his children as should be then living, and to their heirs." I am of opinion, therefore, that the proceeds of the estate under this will go to the children of the testator living at the expiration of the thirty years.

1852.  
LACHLAN  
v.  
REYNOLDS.  
Judgment.

The next question is, what, under this will, is to become of the rents and profits of the real estate, (the personal estate being exhausted), after the death of the widow, and before the expiration of the thirty years from the death of the testator. I think that the rents and profits must go to the children living at the death of the testator. I must consider the testator as intending to make a full disposition of his property, and not to die intestate. He directs that the interest of his real and personal estate is to be applied by his wife for the benefit of herself and children, enjoining her to be very frugal, as there was a large family to support; and on her second marriage or her death, he deprives her of all power and benefit under his will. It could not have been the intention of the testator, that, on the happening of either of these events, after his death, the children should not take, whom he has evinced an anxious desire to benefit. By the subsequent clause, the testator directs that his executors shall order all his property, "both" freehold and leasehold, to be sold. I read the word "both" as expressing the same as if the testator had said "including." The case comes within the principle of *Genery v. Fitzgerald* (a). The rents and profits of the real estate will, therefore, go with the corpus.

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AND this Court doth declare that the Defendants, *Agnes Reynolds, Elisabeth Hands, Georgiana Stringer, Caroline Allen,* and *Randolph Wilson*, being all the testator's children who were living at the death of his widow and at the end of the term of thirty years from his death, became, at the end of such thirty years, entitled each to one-fifth part of the monies to arise from the sale of the real estates, subject [to settlements and mortgages stated in the decree]; and that the rents and profits arising since the death of the said testator's widow are divisible in like fifth parts.

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(a) Jac. 468.

1852.

March 1st &  
2nd.

Amongst several gifts of sums of 300*l.* each to the grand-nephews and nieces of the testator, some of which were to be paid at different ages, and others to be sunk in annuities for the lives of the respective legatees, occurred two bequests, as follows:—  
“*Joseph Walker*, 300*l.* annuity for life;  
*Martha* ———, 300*l.* an annuity for life:”—*Held*, that *Joseph* and *Martha* were each entitled to annuities of 300*l.* for life.

Before the Court can resort to the context of a will, in search of a meaning for the words of a particular clause, it must be satisfied that the meaning of the clause is different from that which the words naturally import.

## WALKER v. TIPPING.

A CLAIM for two life annuities of 300*l.* each, which was resisted by the executors, on the ground that the bequests were of two sums of 300*l.* only. In the will, which follows, the two legacies in question are distinguished by a larger type:—

The last will and testament of *Benjamin Walker*, flax-spinner, of &c., written this 19th day of 10th month, 1843. I, being in a sound state of mind also of body, do dispose or will and bequeath all my worldly property, viz. freehold, personal, and bonded property or estate, as follows: I also appoint the following persons to be my executors of this my last will: 1st, my daughter *Maria Walker*; 2nd, my nephews *Benjamin Walker*, son of my late brother *John Walker*; 3rd, *Thomas Walker*, son of the said *John Walker*; 4th, *Anthony Tiley*, jun., flax-spinner, son of my partner *Anthony Tiley*; 5th, *Benjamin Brayshaw*, of *Leeds*, tinner. I give to my daughter *Maria* all my household furniture of every sort, plate, books, carriages, horses, cattle, and effects thereto belonging, at her disposal. I also leave her 5000*l.* in cash at her sole disposal. I also leave her 30,000*l.* in cash or bonds, to be put out on good security, the interest of which is to be duly paid to her half-yearly or quarterly, as may best suite. I also leave to her the rents of my freehold property at *Cross Hall* and *Rawdon*, the rents and interests to be paid to her as received: should it be thought advisable to dispose of either of these estates, the proceeds to be invested in good security, same as the 30,000*l.*, and the interest paid to my daughter *Maria*; should she have a child or children, the whole of the above-invested property is to go to the child or children at her death, in equal proportions, when the youngest attains to twenty-one years of age. But should she die childless, the whole of the above-invested property to be divided amongst my nephews, nieces, and their representatives, as follows: *Benjamin* and *Thomas Walker*, sons of my late brother *John Walker*, to have double the amount of any other of my nephews and nieces, except *Thomas Walker*, son of my late brother *Thomas Walker*, who is to be equal with his cousins *Benjamin* and *Thomas*, that is, a double portion.

So far I have disposed of the 30,000*l.* to be invested, and the estates at *Cross Hall* and *Rawdon*.

Below I bequeath to my sisters, nephews, and nieces, as follows:

To my sister *Martha Wade*, 50*l.* per year for her life, to be paid to her quarterly.

To my sister *Han<sup>a</sup> Shipley*, 50*l.* per year, to be paid to her quarterly.

To my ares-in-law—

*Hannah Walker*, widow of my late brother

*Robert Walker*, 30*l.* per year, quarterly.

*Nancy Walker*, widow of my late brother

*Thomas Walker*, 30*l.* per year, quarterly.

To my nephews, neices, great nephews, and neices.

To the sons and daughter of my late brother *John Walker*.

I leave my nephew *Benjamin Walker* 1000*l.*

” ” *Thomas Walker* 1000*l.*

*Mary Pickles*, wife of *William Pickles*, 300*l.*, to be laid out in an annuity for her life, paid to her.

*Thomas Walker*, son of the late *William Walker* and *Jemima* his wife, 300*l.*, to be paid to him at the age of twenty-three years.

To the sons and daughters of my late brother *Robert Walker*, and the four daughters of his late son *Benjamin Walker*, who died in *Ireland*:

*Benjamin's* four daughters 75*l.* each, at twenty-one years of age; total, 300*l.*

*Alfred Walker*, son of *Robert*, 300*l.* sunk in annuity for his life. *Robert Walker* 300*l.* in a annuity for life. *Thomas Walker* 300*l.* at twenty-three years of age.

*William Walker* 300*l.* at twenty-three years of age.

*Joseph Walker* 300*l.* annuity for life.

*Hannah Richardson*, wife of *J. Richardson*, 300*l.*

*Martha* ” ” 300*l.* an annuity for life.

*Maria Walker* 300*l.* at twenty-three years of age.

*Frances Walker* 300*l.* at twenty-three years of age.

The daughters and son of my sister *Han<sup>a</sup> Shipley*—

*Martha Shipley* 300*l.* at twenty-three years of age.

*Caroline Shipley* 300*l.* at twenty-three years of age.

*Alfred Shipley* 300*l.* at twenty-three years of age.

The sons of my late brother *Thomas Walker*—

*Thomas Walker* 1000*l.*

*Benjamin Walker* 300*l.* at twenty-three years of age.

*Henry Walker* 300*l.* at twenty-three years of age.

*Benjamin Wade*, son of my sister *Martha Wade*, 300*l.* sunk in a yearly annuity for life.

*John Feather* 10*l.* yearly annuity for life. Friends' School at *Rawdon*, 100*l.* donation. *Benjamin Brayshaw* and *Anthony Tilley* 50*l.* each for their trouble.

The above donations to be paid one year after my death. After paying all my just debts, funeral expenses, and providing for all the foregoing legacies, donations, annuities, &c., the surplus or residue to be given to my daughter *Maria* at her own disposal.

1852.

WALKER

v.

TIPPING.

Statement.

1852.  
 WALKER  
 v.  
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 —  
*Argument.*

Mr. Rolt and Mr. Bagshawe, for the Plaintiffs *Joseph Walker and Thomas Spinks and Martha* his wife, claiming not single sums of 300*l.* but annuities of that amount for the respective lives of the legatees, relied on the plain expressions of the will,—the conformity of the language with that used in the gift of the 10*l.* annuity to *Feather* who was the gardener, and the diversity of the language in the cases where the testator intended the expressed amount to be sunk or laid out in an annuity: *Rawlings v. Jennings* (a).

Mr. Walker and Mr. Tillotson, for the executors, argued, that the context of the will, the similarity of the relation in which the parties stood, as grand-nephews and nieces of the testator, the apparent equality of the sums given, the arrangement and order of the gifts, all clearly manifested the intention to be, that the Plaintiffs should each take a legacy of 300*l.* only, in the form of an annuity for life; and that the direction to sink the amount in an annuity had been omitted for brevity or by inadvertence. The words "annuity for life" directed or were intended to direct the mode of appropriation, and not an annual repetition of the gift. This part of the will, in fact, took a sort of tabular form (b). In the first column of the table was

(a) 13 Ves. 39.

Cases in which the Court will look at an original will of personalty, for the purpose of determining its meaning or construction.

(b) On the question whether, and in what cases, the Court will look at an original will of personal estate, with a view of deriving from the form, character, or manner of writing, or from what otherwise appears thereon, aid in determining the meaning or construction of the will (which was not, however, discussed in the above case), see *Philipps v. Chamberlaine* (4 Ves. 57), *Compton v. Bloxham* (2 Coll. 204).

In a case where the probate copy of the will was in these words:

—"I release my sons, if living at the time of my decease, from all claims due to me by bonds *on* monies advanced to them by me," it was argued on behalf of one of the sons, who was indebted to his father's estate on simple contract, but not on bond, that the word written as "*on*" in the probate was "*or*" in the original will, the second half of the *n* being only the dot at the top of the *r*; and the Court was desired to look at the original will to ascertain the fact. On the other side it was stated, that this very



the person, in the second the sum, and, in the third, the mode of enjoyment which the testator intended to prescribe. The meaning contended for by the Plaintiffs was, moreover, inconsistent with the proof afforded of the degrees of favour and confidence of the testator in his nephews, which led him to appoint two of them his executors, and not to repose that confidence in the Plaintiff *Joseph Walker*, who was, nevertheless, according to the Plaintiffs' contention, a legatee to a much larger amount. And, with regard to the Plaintiff *Martha Spinks*, it was obvious on the face of the will, that the testator did not even know her surname, a fact certainly not reconcilable with the then supposition, that he intended to bestow a benefit upon her, so much greater than those which he gave to nieces whose names were present in his memory.

Mr. *Rolt*, in reply, said the case was not one of ambiguity in which it was necessary to look to the other parts of the will to find the explanation; but the argument on behalf of the estate, and against the Plaintiffs, was founded upon a resort to the other parts of the will, first, to create an ambiguity, and secondly, to remove it, in the way which was favourable to their argument. This was opposed to all the principles which governed the Court in determining upon the meaning of wills.

question had been litigated in the Ecclesiastical Court. Vice-Chancellor *Wood* said, that if, in such a case, he looked at the original will, to ascertain the alleged inaccuracy of the probate, he did not know where such a practice might stop. It might be said, that a whole line was left out, which the Court was to call for the original will for the purpose of inserting. It was different from the case of a question arising on the punctuation of the

will, or on the introduction of a capital letter, or other mark indicating where a sentence or clause was intended to begin, and which might affect its sense: *Oppenheim v. Henry*, 18th Jan., 1853. An application was subsequently made to the Ecclesiastical Court, and the probate copy was ascertained to be incorrect,—the word "on" was altered to "or," and the case was brought before the Court on the corrected probate.

1853.  
WALKER  
v.  
TIPPING.  
—  
*Argument.*

1852.

WALKER  
v.

TIPPING.

Judgment.

VICE-CHANCELLOR:—

This case arises on the construction of two clauses in a will,—the clauses being “To *Joseph Walker* 300*l.* annuity for life;” and “To *Martha* 300*l.* an annuity for life,” the question being, whether, under those words, *Joseph Walker* and *Martha* take capital sums of 300*l.*, or whether they take annuities of 300*l.* for their lives.

The first point to be considered must be, what is the natural import of the words, taking the clause by itself? I will take, first, the disposition in favour of *Joseph Walker*, and the words are “*Joseph Walker* 300*l.* annuity for life.”

Now, I think there are only two modes of reading those words: they mean either “To *Joseph Walker*, a principal sum of 300*l.*, to be enjoyed in an annuity for life,” or “To *Joseph Walker*, an annuity of 300*l.*, to be enjoyed for life.” The first of these two constructions, which makes the gift to be of a principal sum to be enjoyed in an annuity for life, cannot be got at without the addition of some words, for the principal sum cannot be enjoyed as an annuity without being converted into it. The second construction is plain and sensible, without the necessity of any addition; and I take the rule to be, that no addition to or transposition of the words of any clause in a will can be made, if a reasonable construction can be put upon the clause as it stands.

I think, therefore, taking the clause by itself, the second construction must be adopted rather than the first; and that upon the words of the clause, therefore, *Joseph Walker* must take an annuity of 300*l.* for life.

It is said, however, that the context proves a different intent: and two questions then arise, first, whether the

Court can resort to the context; and secondly, whether the context, if resorted to, proves anything.

1852.  
WALKER  
v.  
TIPPING.  
Judgment.

As to the first question, how far the Court can resort to the context, the observations of Lord *Alvanley*, in *Mellish v. Mellish* (a), go very far to shew what is the rule of the Court on that point. In that case the testator, by his will, had bequeathed "to his natural daughter, whom he had by *Mary Ross*, the sum of 3000*l.*," the name of that natural daughter being, as appears from another part of the report, *Ann*; and the residue he thus disposed of:—"I give and bequeath the same unto and among my natural children, *Mary, Samuel, Thomas, Fanny, and Charlotte*, whom I have had by my housekeeper, *Mary Whitaker*, equally to be divided between them, share and share alike, as and when the sons shall attain twenty-one." So that the dispositions were 3000*l.* to *Ann*, his child by *Mary Ross*, and the residue to his five children by *Mary Whitaker*. Then, there came this proviso: "Provided always, and I do hereby direct, that in case of the death of any of them the said *Ann, Mary, Fanny, and Charlotte*," *Ann* not being one of the residuary legatees "before twenty-one or marriage, or of *Samuel* or *Thomas* before twenty-one, without child or children then surviving who shall attain twenty-one, then and in such case I give and bequeath the part, share, or shares of him, her, or them, so dying, unto the survivors of them, share and share alike." Now, *Ann* had no "part, share, or shares" in the residue; and then the question arose, whether the word "*Ann*" was by mistake introduced into that disposition over. What gave rise to the question being this, that the testator, by a codicil, had imported into the will two other natural daughters, one of whom had died under twenty-one. Now, Lord *Alvanley*, in giving judgment in

(a) 4 Ves. 45.

1852.  
WALKER  
v.  
TIFFING.  
—  
*Judgment.*

that case, says: "The only question arose upon a doubt, whether the name '*Ann*,' in the clause of survivorship, was interposed by mere mistake. When first it was opened, I was very much inclined to think the mistake was so apparent that the Court could have excluded her; but, upon very mature consideration of this will, I think I should do too much violence to the words if I were to indulge in speculations, whether the word '*Ann*' did or did not creep into the will by mere mistake." The testator "begins by giving *Ann Ross* 3000*l.*, payable at the age of twenty-one or marriage; and in case of her death before that time, he directs that legacy to be considered as part of the residue of his estate; so that it is taking that sum out of the residue to fall into it again in that event. Then, subject to some legacies and annuities, he gives the residue among his other children; and then comes the clause of survivorship, upon which it is contended that the words 'part, share, or shares,' are so confined to the residue, that it is impossible that the legacy of *Ann Ross* can be included. The question is, can I see sufficient to enable me to declare, that demonstrably and incontrovertibly, the name of '*Ann*' has crept in by mere mistake. I really believe it was so; but I dare not, as a Judge, take upon myself to say this word cannot be reconciled with the rest of the will; and I always understood, that, where there is a mistake or an omission," meaning an alleged mistake or omission, "all the Court has to do is to see whether it is possible to reconcile that part with the rest, and whether it is perfectly clear, upon the whole scope of the will, that the intention cannot stand with the alleged mistake or omission(*a*). And in a subsequent passage of the same judgment the rule is more clearly laid down. The rule, it is said, is, "that wherever there is a clear mistake, or a clear omission, recourse is to be had to the general scope

(*a*) 4 Ves. 48.

of the will, and the general intention is to be collected from it; but the first thing to be proved is, that there is a mistake. I do not find enough to convince me that there is a mistake; and, whenever it comes to be a doubt, the safest way is to adhere to the words"(a). And I fully adopt that rule. I think the Court must be satisfied that something different from what the words naturally import is intended, before it can resort to the context in search of a different meaning for those words.

1852.  
WALKER  
v.  
TIPPING.  
Judgment.

But, secondly, supposing the context to be resorted to in this case, I can find in it no certain guide as to the interpretation to be put upon this clause. It is true, that other sums are given to be sunk in annuities for life. Those dispositions are differently expressed, and the difference of expression rather imports a difference of intention. No ground for the interpretation suggested by the argument can be laid from the relationship of the legatees, for how can the Court be satisfied that the testator had the same intention as to different members of the same family? The context of the will in this case, in truth, only leads to speculation and conjecture; for, except from the connection of the parties, the Court might just as well infer from the context that the testator intended the same provision for *Joseph Walker* as he has made for *John Feather*, as that he intended the same provision for *Joseph* as he has made for his brothers and sisters; and certainly the Court could not be governed in the construction of the will merely by the connection of the parties.

My opinion, therefore, is, that *Joseph* is entitled to an annuity of 300*l.* for his life.

Then is there any difference as to the bequest to *Martha*?

(a) 4 Ves. 50.

1852.  
 WALKER  
 v.  
 TIPPING.  
 Judgment.

I think not. Precisely the same reasoning seems to me to apply to this clause of the will. The expression "300*l.* an annuity for life," is open to the same double construction, and, upon the clause itself, must, for the same reason, receive the same interpretation as the expression "300*l.* annuity for life:" there is the same difficulty in resorting to the context, and in drawing the desired conclusion from it, if it be resorted to.

I think, therefore, that *Martha* is also entitled to an annuity for life.

June  
 Minute.

THE Defendants moved before the Lords Justices to discharge the order. The Reporter has not been able to ascertain that their Lordships expressed any opinion on the case; but from the order, of which a minute is given below, it appears that the Court, on behalf of the Plaintiff and Defendant, who were married women, approved of a compromise of the claim:—"Declare, that it will be fit and proper, and for the benefit of the Plaintiff *Martha Spinks* and the Defendant *Maria Tipping*, that the claims of the Plaintiffs should be compromised upon the terms hereinafter mentioned: the Defendants offering to pay to the Plaintiff *Joseph Walker*, 1550*l.*, in discharge of all claims under the following bequest in the will of &c., the Plaintiff *Joseph Walker* agreeing to accept the same sum in full for his claims by virtue of such bequest; and the Plaintiff *Joseph Walker*, by his counsel, admitting that he has received 50*l.* in respect of the said sum of 1550*l.*: Let the Defendants, within one month, pay to him 1500*l.*, and declare that such payments are to be in full satisfaction of all claims of the Plaintiff *Joseph Walker* in respect of such bequest. And the Defendants offering to pay to the Plaintiff *Thomas Spinks* the sum of 50*l.*, and to pay into Court to the credit of this cause the sum of 1500*l.*, for the benefit of the Plaintiff *Martha Spinks*, in discharge of all claims under the following bequest &c.; And it appearing to this Court that it will be for the benefit of the Plaintiff *Martha Spinks* to accept the said offer, and the Plaintiff *Thomas Spinks* agreeing to accept the same in full for the claims of the said Plaintiff *Thomas Spinks* and *Martha* his wife, or either of them, by virtue of such bequest, and the Plaintiff *Thomas Spinks*, by his counsel, admitting that he has received the said sum of 50*l.*: Let the Defendants within one month pay into Court the sum of 1500*l.* in trust in this cause, and declare that such payments are to be in full satisfaction of all claims of the said Plaintiff *Thomas Spinks* and *Martha*

his wife, or either of them, under or by virtue of the said last-mentioned bequest; And upon payment of the said last-mentioned sum of 1500*l.* into Court, let the Accountant-General invest 300*l.*, part thereof, in the purchase of 3*l.* per cent. Bank Annuities; and let the dividends thereof be paid to the Plaintiff *Martha Spinks*, upon her separate receipt, until further order, with liberty to apply touching the same; And the said Plaintiff *Martha Spinks* being examined and consenting, and it appearing by affidavit that there was no settlement on the marriage of the said Plaintiffs, let the remaining 1200*l.* be paid to the Plaintiff *Thomas Spinks*; And the Defendants, upon acceptance by the Plaintiffs of the aforesaid offers, consenting to pay the costs hereinafter directed to be taxed, let the Defendants pay the Plaintiffs their costs of this suit, including those of the appeal, to be taxed as between solicitor and client.

1852.  
WALKER  
v.  
TIPPING.  
Minute.

YONGE v. REYNELL.

May 24 & 25,  
June 1.

(ON an application to dissolve the common injunction, restraining proceedings in an action at law against the Plaintiff, in the name of *W. G. Watson* and *J. Watson*, the following facts appeared upon the answer:—On the 15th of July, 1843, Sir *Thomas Reynell* conveyed a moiety of certain estates to *Charles Wilson*, to such uses as *Sprye* and his wife should jointly appoint; and in default of appointment to *Sprye* for life, then to his wife for life, and

In a suit by *A.* against *B.* and *C.*, a conveyance of an estate by *A.* to *B.* was declared void, and set aside for fraud, except as to an intermediate mortgage of the estate made by *B.* to *D.*, to secure a sum of

money lent by *D.* to *B.*, and for which *C.* had joined *B.* as his surety in a bond and covenant to *D.*; and the decree also directed *B.* to redeem the estate and procure its reconveyance to *A.*, and, if he did not do so, gave *A.* the right to redeem, and to use the name of *B.* for that purpose, and to recover from *B.* the money which *A.* should pay to *D.* for such reconveyance; and the bill was dismissed against *C.* *A.* afterwards procured an assignment of *D.*'s mortgage to a trustee, and in the name of the mortgagees brought an action against *C.* on his covenant and bond:—*Held*, that, if *A.* had redeemed *D.*, the debt would have gone as against *C.*; that *C.*, as the surety of *B.*, would, on payment of the mortgage debt, be entitled to the benefit of the security held by *D.*, such security not having been disturbed by the decree; that the charge of participation by *C.* in the fraud, whereby *B.* had been enabled to create the mortgage on the estate, was not a ground for depriving *C.* of such right; and that *C.* was, therefore, in a suit for an injunction to restrain *A.* from suing him on the bond and covenant, entitled to such relief.

The circumstance of the dismissal, as against *C.*, of the bill brought by *A.* against *B.* and *C.*, which prayed that the mortgage debt might be paid by *B.* and *C.*, was material to the case, though it was not alone conclusive, as it might well be that there might be no equity to compel *C.* to pay the debt, though *C.* might have no equity to be relieved from his legal liability to pay it.

The right of a surety to the benefit of the security held by the creditor, is derived from the obligation of the principal debtor to indemnify his surety—*Semble*.

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afterwards to *Sprye* in fee. On the 13th of January, 1844, *Sprye* and his wife, under that power, appointed the moiety of the estate to the *Watsons* for securing the sum of 400*l.*; and the Plaintiff, *Yonge*, who was the solicitor of *Sprye*, and *Sprye*, entered into a joint and several covenant for payment of the 400*l.*; and on the same date the Plaintiff *Yonge* and *Sprye* gave a joint and several bond to the *Watsons* for securing the sum of 400*l.* On the 30th of April, 1844, a further charge of 300*l.* was executed; but in this security Mr. *Yonge* did not join. On the 3rd of April, 1846, Sir *Thomas Reynell* filed a bill for the purpose of setting aside the deed of the 15th of July, 1843, on the ground of its having been fraudulently obtained from him by *Sprye* and *Yonge*. The answers to that bill having been put in, and having disclosed the fact of the securities to the *Watsons*, the Plaintiff, in March, 1847, amended his bill, and made the *Watsons* parties. On the 14th of July, 1847, the *Watsons* answered the amended bill, denying all knowledge of the fraud. In November, 1847, Sir *Thomas Reynell* dismissed the bill against the *Watsons*, and the bill was re-amended, and a statement inserted that the Plaintiff did not seek to disturb their security; and the re-amended bill prayed that the amount due on the mortgages might be paid by both *Sprye* and *Yonge*. In this stage of the cause Sir *Thomas Reynell* died, leaving Lady *Elizabeth Louisa Reynell* his devisee and sole executrix.

On the 22nd of February, 1848, Lady *Reynell* filed a bill of revivor; the usual order to revive was made; and, evidence having been entered into in the cause, a decree was made on the 6th of November, 1849 (a), which declared that the deed of the 15th of July, 1843, was void, except as regarded the two mortgage deeds of the 15th of January, 1844, and the 23rd of April, 1844; and that *Sprye*

(a) See *Reynell v. Sprye*, *Sprye v. Reynell*, 8 Hare, 222.



was bound to pay to the *Watsons* the principal, interest, and costs due on the mortgage, and to procure at his own expense a re-conveyance of the mortgaged property to Lady *Elizabeth Louisa Reynell*, or as she should direct; and it was referred to the Master to take an account of the principal, interest, and costs due to the *Watsons* on the mortgages; and *Sprye* was ordered, on or before the 6th of July, 1850, to pay to the *Watsons* the amount of what should be found due to them; and it was declared, that Lady *Elizabeth Louisa Reynell* was to be at liberty to use the names of the Defendants *Sprye* and wife and *Charles Wilson*, in such proceedings as might be necessary for procuring a re-conveyance to her, or as she should direct, of the mortgaged property; and that she was to be entitled to recover, against *Sprye*, the principal, interest, and costs, she might properly pay to the *Watsons* for the purpose of procuring the re-conveyance; and upon satisfaction of the mortgage, it was ordered, that the deed of the 15th of July, 1843, should be delivered up to be cancelled; and *Sprye* and his wife and *Charles Wilson* were restrained by injunction from interfering with the property, except for the purpose of procuring such re-conveyance thereof from the *Watsons* to the Plaintiff; and it was ordered that the original bill of Sir *Thomas Reynell* and the supplemental bill of Lady *Elizabeth Louisa Reynell* should be dismissed as against *Yonge*, without costs.

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On the 13th of December, 1849, after the decree, Mr. *Walker*, the solicitor of Lady *Reynell*, purchased the two mortgage debts of 400*l.* and 300*l.* from the *Watsons*, with the sanction of Lady *Reynell*, and took an assignment of the securities, to *Pugh*. *Pugh*, by a separate deed, acknowledged himself to be a trustee for Mr. *Walker*. In January, 1850, Lady *Reynell* paid off Mr. *Walker*; and *Pugh*, thereupon, became her trustee.

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In November, 1851, Lady *Reynell* having brought an action in the names of the *Watsons* against the Plaintiff *Yonge*, to recover the sum of 400*l.* secured by his covenant and bond, this bill was filed by *Yonge* against Lady *Elizabeth Louisa Reynell*, *Pugh*, the *Watsons*, *Sprye* and his wife, and *Charles Wilson*, to restrain the action. The answer of Lady *Elizabeth Louisa Reynell* stated, in addition to the above facts, as against *Yonge*, a case of fraud in respect of the transactions between *Sprye* and Sir *Thomas Reynell* (a).

*Argument.*  
 —

Mr. *Willcock* and Mr. *Terrell*, for the Plaintiff, shewed cause against dissolving the injunction.

The Defendant has, by virtue of the decree in *Reynell v. Sprye*, been enabled, as against *Sprye*, to redeem the mortgage, and to stand in the place of *Sprye* for that purpose if *Sprye* should fail to obey that part of the decree which directed him to redeem for her benefit; but the Defendant did not, by the decree in *Reynell v. Sprye*, acquire any right against *Yonge* the present Plaintiff, or any right to compel *Yonge* to pay off the mortgage debt if *Sprye* should fail to do so. If the present Defendant, as Plaintiff in *Reynell v. Sprye*, had any equity as against *Yonge*, who was before the Court, to make him a surety for the payment by *Sprye* of *Watsons'* mortgage, such equity should have been asserted and enforced in the suit, in the presence of all the parties; and the bill in that suit having been dismissed as against the *Watsons* the mortgagees, on the application of the Plaintiff, and afterwards dismissed by the Court as against *Yonge*, it was not now open to the present Defendant to assert any right as against *Yonge*.

(a) The nature of the case thus made was the same as that which appears in the report of *Reynell v. Sprye*, *Sprye v. Reynell*, 8 Hare, 222 et seq.

The decree in the former suit is in fact a decision that she had no such right. The Defendant not having any such right as against *Yonge*, even taking the statements in the answer (but for the purpose of the argument only) to be true, cannot acquire such right by getting in the benefit of the security from the *Watsons*. *Yonge* was a security only for the estate. That estate is now vested in the Defendant, and is amply sufficient to bear the charge; and *Yonge*, if sued by the *Watsons* or any person claiming under them, would be entitled to the benefit of the estate as his indemnity. The Defendant is, therefore, seeking to recover at law from *Yonge*, what *Yonge* is entitled in equity to recover back from the Defendant. The action is, therefore, idle and oppressive, and will be restrained by this Court: *Copis v. Middleton* (a), *Lord Harborton v. Bennett* (b).

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*Argument.*

Mr. Rolt and Mr. Shapter for the Defendant Lady *Elisabeth Louisa Reynell*.

The first question, which is one of much importance, is, on what principle is it that the surety gets the benefit of the security which the creditor holds? It is on the principle of equity, not on the ground of the contract. The creditor has in his hands a collateral security for his debt; but it does not necessarily follow, that a surety paying the debt should be entitled to the benefit of that collateral security. There may be no privity between the owner of the property which constitutes such collateral security, and the surety by whom the debt has been paid. The property might have been subjected to the debt from a desire to benefit the debtor, or to facilitate a loan; or the case might be one where there are co-sureties, and the extent of the right of the one against the other, if any, could only

(a) T. & R. 224, per Lord *Eldon*, 229, 231.

(b) *Beatty*, 386.

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be a right to contribution. Again, one of two co-sureties may have received an indemnity from another party, who therefore would stand in the position of sub-surety, and against him the other parties would have no right whatever. The rule, therefore, that a surety is entitled to stand in the place of the creditor against the principal, can extend no further than this: that everything which the principal debtor can, upon payment of the debt, call upon the creditor to give up, the surety, on paying the debt, may also call upon him to give up. This is the qualification with which all those expressions must be read, which import that the surety is entitled to the benefit of all the remedies which the creditor has against the principal. The principle of the rule is distinctly stated by Lord Eldon in *Aldrich v. Cooper* (a). He says:—"In the case of a surety, it is not by force of the contract, but that equity upon which it is considered against conscience, that the holder of the securities should use them to the prejudice of the surety; and, therefore, there is nothing hard in the act of the Court placing the surety exactly in the situation of the creditor" (b). The question, therefore, comes to this—whether it is against conscience that Lady Reynell should, as against Yonge, enforce this security. That question may be examined, first, on the hypothesis that Yonge was not a party to the fraud by means of which the mortgage was effected; and secondly, upon the case stated by the answer (upon which the motion is made), that Yonge was a party to the fraud. 1. Supposing Yonge had paid the debt to the Watsons with or without suit, could Yonge have called for a conveyance of the estate which Sprye was, by the decree, directed to redeem for the benefit of Lady Reynell. It is clearly not a case in which he would be entitled to that relief. Lord Eldon, in *Copis v. Middleton*, says, that the rule entitling the surety to

(a) 8 Ves. 382.

(b) Id. 389.

the benefit of the creditor's securities "must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor" (a). Lord *Brougham*, in *Hodgson v. Shaw* (b), expresses the principle in terms substantially the same. He says:—"The surety may enforce any security against the debtor which the creditor has; but, by the supposition, there is no security to enforce, for the payment has extinguished it. He has a right to have all the securities transferred to him, but there are in the case supposed none to transfer; they are absolutely gone" (c). That is the present case. The decree has taken away all interest in the security from the principal debtor, and has not removed the liability of *Yonge*. The fallacy on the other side is the assumption that *Sprye* was not the principal debtor, which he and he alone clearly was. On the hypothesis, therefore, of the innocence of *Yonge* on the point of fraud, it is his misfortune that *Sprye*, his principal, had no title to the estate which he gave to the *Watsons* as a security for the money; and, *Sprye* having no title to that estate, how can *Yonge* get it from him? It is perfectly without ground to say, that Lady *Reynell* was in any sense the principal debtor, or that *Yonge* can have any right against her. Lady *Reynell* has placed herself in the position of the *Watsons*, and may enforce any remedies which the *Watsons* had: there is nothing in the decree to preclude her from doing this. Then, if *Yonge* be sued on his covenant, what are his rights? Not to everything that the *Watsons* had, but only to such securities as *Sprye* could have called for and held if *Sprye* had paid the debt. *Yonge's* remedies are against *Sprye*, to recover what he may be compelled to pay as his surety, and, as against other persons, all that *Sprye* himself could hold against them. But it was said, the estate, and

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(a) T. &amp; R. 229.

(b) 3 My. &amp; K. 183.

(c) Id. 191.

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*Argument.*

not the person, was the debtor. There was no authority for this proposition. On what principle of equity could it be said that the estate should be applied for the relief of *Yonge*? The argument might be thus put:—*Yonge* joined in the security, on the supposition that the estate was to be charged as well as *Sprye*, and he relied on the sufficiency of the estate to pay the debt; but the case only amounts to this, that *Sprye* deceived him; and he finds himself liable to pay the debt without the aid of the estate: that gives him no equity against the true owner of the estate. If no right could exist to throw the debt on the estate as a primary security, was there then any right to call for the aid of the estate in contribution? But this is not a case for contribution; neither does the bill ask that relief: *Dering v. Earl of Winchelsea* (a), *Pendlebury v. Walker* (b), *Turner v. Davies* (c). 2. Taking the case against *Yonge* as it stands upon the answer,—as a party to the fraud, by which the estate was made a security to the *Watsons*, he must have known that *Sprye* had no title; and clearly, in such circumstances, cannot pursue the estate in the hands of the true owner. The equities, as between the *Watsons*, *Yonge*, and *Sprye*, could not be the subject of adjudication in the other suit. It was sufficient in that suit, to which *Yonge* was a party, that the title of Lady *Reynell* to the estate was declared. The rights of the several Defendants inter se were left open. The present Defendant now contends that *Yonge* has no equity against her.

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VICE-CHANCELLOR:—

*Judgment.*  
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In determining the question, whether this injunction ought to be continued, it must, I think, first be considered

(a) 1 Cox, 318.

(b) 4 Y. & C. 424.

(c) 2 Esp. 478.

what was the position of the case before the making of the decree in the suit instituted by Sir *Thomas Reynell*; and upon this part of the case, there can, I think, be no doubt that *Yonge* joined in the bond and covenant as surety for *Sprye*; and that, upon payment of the debt due on the bond, he was entitled to the benefit of all the securities which the *Watsons* had against *Sprye*, and therefore of the mortgage in question.

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This, then, being the position of the case up to the date of the decree, we must next consider whether the decree has altered the rights of Mr. *Yonge*. Now, the decree has declared the deed of the 15th of July, 1843, to be fraudulent and void, except as regards this indenture of mortgage, and another indenture on which no question arises. It has given to Lady *Reynell* a right to redeem the mortgage, and to use the name of *Sprye* for the purpose of redemption. It has given her also a right to recover the debt from *Sprye* if she redeems, and has dismissed the bill as against *Yonge*. The decree has, therefore, validated the mortgage, to the benefit of which Mr. *Yonge* was entitled upon payment of the debt; and, although it has given rights to Lady *Reynell*, those rights could not have been intended to interfere, and do not, I think, interfere with the rights which previously belonged to *Yonge*; for, if Lady *Reynell* redeemed, she would have paid the debt due to the *Watsons*, and that debt would have gone as against *Yonge*. That it was not intended that the debt should be paid by *Yonge*, is more clear from the fact, that the bill, having prayed that he might pay it, was dismissed as against him; and this consideration seems to be very material to the present case, although it would, I think, perhaps be going too far to treat it as deciding it; as it may well be, that there might be no equity to compel Mr. *Yonge* to pay the debt, though he might have no equity to be relieved from the legal liability to pay it.

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 —  
*Judgment.*

It was insisted, on behalf of the Defendant, that there could be no such equity on the part of *Yonge* to be relieved, because *Sprye* could not have called for the mortgage if he had paid the debt, he being bound by decree to pay it; but this argument cannot, I think, be maintained, for the decree upholds the mortgage as to the *Watsons*, and the *Watsons* could not call for payment from Mr. *Yonge* without giving him the benefit of their security. The argument was, that the surety could only have the benefit of such securities as the creditor had against the principal debtor; and that the estate was not debtor, or, at all events, ceased to be debtor by the decree. But it seems to me to be a sufficient answer to this argument, that the estate remains debtor until the debt is paid, and that *Yonge's* right to pay the debt and have the benefit of the security was not taken away by the decree.

It was said, that the rights of a surety could not be founded on contract, but on natural equity; and some observations of Lord *Eldon*, in *Aldrich v. Cooper* (a), to this effect, and that the right was founded on its being against conscience to sue the surety, were cited for the Defendant; but the words of Lord *Eldon* were, I think, pressed in this part of the argument beyond their meaning. It is undoubtedly true that the rights of a surety are not generally founded on contract, for the surety seldom if ever stipulates for the benefit of the security which the principal debtor has given; but when Lord *Eldon* says it is against conscience to sue the surety, it must be considered what is the meaning of that expression, and why this Court considers it against conscience that the surety should be sued; and I take it to be, because, as between the principal and surety, the principal is under an obligation to indemnify the surety; and it is, as I conceive, from

(a) 8 Ves. 382.



this obligation the right of the surety to the benefit of securities held by the creditor is derived. The principle is not, I think, much dissimilar to that which applies where a man directs part of his estate to be employed in carrying on a trade, in which case the creditors of the trade have a right to resort to that part of the estate, because the trustees have a right to be indemnified out of it.

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—  
*Judgment.*

Much was said at the bar on the general question, as to what securities a surety is entitled to the benefit of; but this question may depend so much on the circumstances of each case, and on the nature of the securities, that I think it better to give no opinion upon it beyond this—that I think the Plaintiff is entitled to the benefit of this mortgage.

Reliance was also placed, on the part of the Defendant, upon the allegations in the answer impeaching the conduct of *Yonge*; but this case of fraud on his part was, or might have been, made in the former suit; and if it could now be made at all, it would, I think, be the proper subject of a bill by Lady *Reynell*, and not of a defence to a suit by *Yonge*, founded on a distinct equity. Upon the whole, therefore, I am of opinion the injunction must be continued.

1851.

IN THE MATTER OF MEYRICK'S ESTATE, AND OF THE  
TRUSTEE ACT, 1850 (a).

SEE the next case, "In the Matter of *Boden's Estate*," in which the principle of the decision in this case was overruled.

(a) *Ante*, p. 116.

*Dec. 22nd.*

IN THE MATTER OF BODEN'S ESTATE, AND OF THE  
TRUSTEE ACT, 1850.

On the petition of the executors of a mortgagee in fee, who had not been in possession or receipt of the rents and profits of the mortgaged premises, who had died intestate as to the legal estate, and whose heir could not be found, the Court, under the Trustee Act, 1850,—the mortgage-debt remaining unpaid,—made an order vesting the mortgage estate in such executors, subject to the equity of redemption.

THE executors of *William Boden*, a mortgagee in fee, applied for an order to vest in themselves the legal estate in the mortgaged premises. The heir-at-law could not be found. The Lords Justices directed a reference to the Master (a): who found that the mortgage-money remained due to the petitioners, the executors; that the testator was never in possession or receipt of the rents and profits of the premises comprised in the mortgage; that he died intestate as to the legal estate in the same; and that *J. B.*, if living, was his heir-at-law; that *J. B.* could not be found, and it was uncertain whether he was living or dead; and that *J. B.* had never entered into possession or receipt of the rents and profits of the mortgaged premises.

Mr. *Webster* for the petition.

The VICE-CHANCELLOR made the vesting order.

(a) See 1 De G., Mac., & G., 57.

1852.

AARON v. AARON.

June 7th.

**J. AARON**, by a codicil to his will, dated in 1831, gave to *Ann Aaron*, the wife of his son *John Aaron*, for and during the term of her natural life, one annuity or clear yearly rent-charge or sum of 70*l.*, free from all deductions whatsoever, to be paid to her his said daughter-in-law by equal half-yearly payments. And the testator declared, that, in case his said daughter-in-law *Ann Aaron* should die before her husband *John Aaron*, the annuity of 70*l.* a year should be continued and paid in like manner to any after-taken wife which his son might marry, provided she resided and lived with his said son up to the time of his death.

Order providing for a contingent annuity for the life of a future wife of the son of the testator.

At the hearing of the cause for further directions,

The VICE-CHANCELLOR made an order, providing for the payment of these annuities in the following form:—

“ And it appearing by the affidavit of *P. J. Gordon*, that the value of an annuity for 70*l.*, for the life of the Defendant *Ann Aaron*, taken on the 8th day of October, 1831, the day of the death of *John Aaron*, the testator in &c., is the sum of 730*l.* And that the value of an annuity of 70*l.*, to commence on the death of the said Defendant *Ann Aaron*, in the event of her husband the Defendant *John Aaron* surviving her, and to continue during a female life of the age of fifteen years, at the commencement thereof, is the sum of 394*l.* [Directions that the estate of the testator be apportioned between the annuities and legacies.] And let the aggregate amount thereof be apportioned between the Defendant *Ann Aaron* in respect of the said value of her said annuity of 70*l.*, together with such interest as aforesaid of the said several legatees in

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respect of their several legacies, together with such interest on the same respectively as aforesaid; and the contingent annuity given by the said testator to any after-taken wife of the Defendant *John Aaron*, estimated at the aforesaid valuation of 394*l.* . . . And let the amount coming to the said Defendant *Ann Aaron*, and in respect of the said contingent annuity to any after-taken wife of the Defendant *John Aaron*, and to the said legatees respectively upon such apportionment as aforesaid, after such deduction as aforesaid, be certified; and out of the residue of the money to arise from such sale after the payment of such costs as aforesaid, let what shall be certified to be coming to the said Defendant *Ann Aaron*, the wife &c., be paid to her for her separate use; and let what shall be certified to be coming to the said legatees respectively, be paid to them respectively; and let what shall be certified to be coming in respect of the contingent annuity to any after-taken wife of the Defendant *John Aaron*, be carried over, with the privilege &c., to an account to be intituled "The Contingent Annuity Account," and let the same, when so carried over, be laid out &c.

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Sir *W. P. Wood*, Mr. *Follett*, Mr. *Bird*, Mr. *Speed*, and Mr. *Robson*, for the several parties.

1852.

THE OFFICIAL MANAGER OF THE GRAND TRUNK OR  
STAFFORD AND PETERBOROUGH UNION  
RAILWAY COMPANY *v.* BRODIE.

Jan. 13th,  
14th, 15th,  
16th, 26th to  
30th.  
June 28th.

THE bill was filed by *John Warren*, on behalf of himself and all other the share or scripholders of and subscribers to a Company, called the Grand Trunk or *Sheffield and Peterborough Union Railway Company*, except the Defendants, who were the provisional directors, secretary, and clerk of the Company. The Company was formed in 1845, and a deposit of 2*l.* 2*s.* per share was paid by the subscribers. The Plaintiff *Warren* was a subscriber for forty shares, and paid the deposit upon them. The Company failed in the year 1846; and resolutions were passed for paying back to the subscribers, in the first instance, a dividend of 1*l.* 1*s.*,

A bill, originally commenced by one on behalf of the other shareholders of an abortive Railway Company (except the Defendants), to recover from the provisional directors and secretary monies alleged to have been abstracted from the Company by the fraud of some and negligence of

others of the Defendants; and afterwards ordered to be prosecuted by the official manager under the Winding-up Act 11 & 12 Vict. c. 45, s. 53. It appeared that the bill had been filed by the former solicitor of the Company, and that the original Plaintiff had (as stated by the answers, and not denied) been indemnified by such solicitor; and the Court being satisfied, from those and other circumstances, that the suit had its origin in other motives than the benefit of the shareholders, and finding that it was improperly constituted, and that the bill contained charges which ought not to have been made:—*Held*; that, having regard either to its frame or its merits, it ought not to have been adopted by the official manager; and the bill was dismissed, with costs to be paid by him.

A Railway Company having failed in prosecuting the undertaking, resolved to return the unapplied portion of the deposits to the shareholders rateably; and, on the first instalment being repaid, the original scrip certificates were called in and new certificates issued, to the effect that the holders were entitled to a further *pro ratâ* division of the balance of the Company's funds; and on payment of the final instalment of the unapplied fund, the new certificates were called in, and the shareholders were required to sign a memorandum, undertaking to release the directors when called upon to do so:—*Held*, that the terms on which the old and new certificates respectively were delivered up constituted new contracts between the shareholders and the directors; that the persons entering into such contracts in ignorance of the frauds which were alleged to have been committed by the directors, would, on proof of such frauds, be entitled wholly to undo such contracts, but not to set them aside partially, by retaining the instalments and getting rid of the agreement to release the directors; that one shareholder, having no right to make an election for the others, between abiding by the new contracts or setting them aside, could not sue on behalf of himself and all other shareholders to recover from the directors more than the amount which was refunded under the contracts.

The official manager, prosecuting under the 53rd section of the 11 & 12 Vict. c. 45, a suit previously commenced, can have no better right than the original Plaintiff had, but must adopt the suit with all its imperfections and infirmities; and can only make such amendment in it as the state of the cause would have allowed the original Plaintiff to make.

Whether a suit can, under the Winding-up Act 11 & 12 Vict. c. 45, s. 53, be brought on behalf of all the shareholders *except* the Defendants, or otherwise than on behalf of the entire Company—*Quære*.

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 OFFICIAL  
 MANAGER OF  
 THE GRAND  
 TRUNK &c.  
 RAILWAY CO.  
 v.  
 BRODIE.  
*Statement.*

and afterwards a further dividend of 2s. 6d. per share. These dividends were paid through *Harman*, the secretary of the Company, to whom cheques on the bankers, signed by some of the provisional directors, were given for the purpose; but it appeared that *Harman*, in many instances, paid the dividends in cash, paying the cheques into his own bankers to his private account. The dividend of 1l. 1s. per share was paid on 1490 shares, which were fraudulently issued, and on which the deposit of 2l. 2s. per share had not been paid. The sum thus paid in respect of the 1490 shares amounted to 1564l. 10s.; and twenty-four cheques on the bankers for sums amounting in the aggregate to that sum, were signed by some of the provisional directors of the Company, and placed in *Harman's* hands for the purpose of the payment. These cheques all went to *Harman's* private account with his bankers, as did also three other cheques for 1000l., 1000l., and 217l. 10s., which were drawn on the bankers and signed by some of the provisional directors, and given to *Harman* for the purpose of paying the dividend of 2s. 6d. per share. The dividends of 1l. 1s. and 2s. 6d. per share were paid on 200 shares belonging to the Company; and these dividends, amounting together to 235l., were received by *Harman*. Several of the provisional directors also received out of the funds of the Company some small payments by way of remuneration for their services.

The bill prayed that the Defendant *Harman* might be decreed to repay, with interest at 5l. per cent., the 1564l. 10s. received by him by means of the cheques, and also the 235l. received by him in respect of the dividend on the 200 shares; and might also be decreed to pay all other monies belonging to the Company and retained to his own use, which had been received by him, or for which he was liable or accountable, including the proceeds of the cheques for 1000l., 1000l., and 217l. 10s., after allowing him what,

if anything, might appear to have been properly paid by him out of such monies on behalf of the Company; that proper accounts might be taken for ascertaining what was due from *Harman*; that it might be declared that the payments in respect of the 1490 shares were breaches of trust on the part of the Defendants who signed the twenty-four cheques; and that those Defendants might be decreed to make good to the Company all losses incurred by means thereof, to the extent of the cheques signed by them respectively, with interest thereon. That it might also be declared that the payments of the 1000*l.*, 1000*l.*, and 217*l.* 10*s.* to *Harman*, were also breaches of trust on the part of the Defendants who signed the cheques; and that they might be decreed to make good all losses incurred by means thereof to the extent of such cheques. That the directors might refund, with interest, all monies of the Company retained and applied by them to their own use by way of remuneration for their services, or in any other manner not authorised by the subscribers' agreement. That the monies which ought to be standing to the credit of the Company at their bankers, but which had been improperly abstracted or lost by the Defendants respectively, might be ascertained and made good by them according to their several liabilities, with interest. And that all monies which might be directed to be made good by any of the Defendants, might be paid to the bankers to the account of the provisional directors for the use of the Company, and might be applied in paying the debts and liabilities thereof.

The bill was filed on the 23rd of December, 1846; and on the 26th of April, 1848, after several of the Defendants had put in their answers, an order for winding up the Company was obtained, under the provisions of the Joint-stock Winding-up Acts. An official manager was appoint-

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ed under the powers of the Acts; and on the 31st of July, 1849, an order was made in the cause and in the matter, by which it was ordered, that the suit should be prosecuted by the official manager as the nominal Plaintiff, for and on behalf of the Company (a). The material facts of the case, as they appeared upon the pleadings, are the subject of comment in the judgment.

At the hearing,

Argument.

Mr. Stuart, Mr. Welford, and Mr. Collier, for the Plaintiff.

The Solicitor-General, Mr. Rolt, Mr. Willcock, Mr. Bailly, Mr. Rogers, Mr. Hetherington, Mr. Kenyon, Mr. Osborne, Mr. Nichols, Mr. Selwyn, Mr. Stevens, Mr. W. M. Morris, and Mr. Cracknell, for the several Defendants.

The Plaintiff relied upon the fact, that the frauds complained of were proved to have been committed on the Company; and contended, that there was enough on the evidence to shew that the Defendants were either participators in the frauds, or were at least chargeable with negligence in not preventing them.

On the part of the Defendants, in addition to the general points on which they resisted the suit (which, so far as the Court proceeded upon them, are all noticed in the judgment), the arguments consisted of comments on those portions of the pleadings and evidence which were applicable to each Defendant respectively; and upon which it was contended, on behalf of each Defendant, that no case of fraud or negligence had been established against him.

The following cases were cited on the duties and responsibilities of directors, and on the question whether they

(a) See 11 & 12 Vict. c. 45, s. 53.



stood in the relation of trustees:—*Brice v. Stokes* (a), *Cafrey v. Darby* (b), *Clough v. Bond* (c), *Styles v. Guy* (d); *Sibson v. Edgeworth* (e), *Carrick's case* (f), *Apperly v. Page* (g).

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Two questions, not involving the merits of the case, were much discussed at the hearing of the cause: whether the original Plaintiff could maintain the suit; and what was the effect of the order for the prosecution of it by the official manager.

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As to the competency of the original Plaintiff to have maintained the suit.—It appears by the bill, that, about the latter end of 1845, the original Plaintiff deposited the scrip certificates for his forty shares with *J. W. Sharman*, for securing the sum of 50*l.* That, upon the dividend of 1*l.* 1*s.* per share being paid, the original scrip certificates were called in, and new certificates issued to the holders, to the effect that they, having delivered the original scrip to be cancelled preparatory to the dissolution of the Company, were entitled to a further pro rata division of any balance that might remain of the Company's funds, after discharging thereout all claims upon and liabilities of the Company and directors, in full discharge of all claims upon the Company and directors for their share and interest in the undertaking; and that *Sharman* sent in the original scrip certificates for the Plaintiff's forty shares, and received the new certificates in lieu of them. That afterwards, upon the dividend of 2*s.* 6*d.* per share being paid, the new certificates were called in; and the parties who brought them in signed memorandums to the effect, that, in consideration

(a) 11 Ves. 319.

(b) 6 Ves. 496.

(c) 3 My. & Cr. 490.

(d) 1 Mac. & G. 422.

(e) 2 De G. & S. 73.

(f) 1 Sim., N. S., 505, 509.

(g) 1 Ph. 779.

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of receiving from the directors the 2s. 6d. per share, being the final instalment payable on the shares held by them in the Company, they undertook to sign a release to the directors when called upon to do so; and that *Sharman* sent in the new certificates for the Plaintiff's forty shares, and signed this memorandum.

It appears, therefore, by the bill, that, both upon the original certificates, and upon the new certificates being delivered up, new contracts were entered into by the parties who brought them in; and the bill does not seek to undo either of these contracts, but proceeds upon the footing of the original Plaintiff being entitled to recover beyond the amount which was refunded under the contracts.

It is to be considered, therefore, whether the Plaintiff, suing on behalf of himself and the other scrip holders, could have maintained this right; and in order to test this question, I will assume what is alleged by the bill, that *Sharman* is to be considered to have been merely the agent of the Plaintiff in delivering in the certificates; that both he and the Plaintiff were ignorant of the frauds which had been committed; and that some of the Defendants were cognizant of and participators in those frauds.

Upon these assumptions, it could hardly be denied, that the original Plaintiff and his mortgagee would have been entitled to undo the contracts which were entered into upon the original and new certificates being given up, and could not have been held bound by the undertaking to release the directors; but does it follow that they could undo the contracts and at the same time retain the monies which had been received under them. I think that it does not, and that the contracts, if undone at all, must have been undone in toto: that they could not be undone as to the agreements to release, and left standing as

to the monies which had been paid as the consideration for such agreements.

What, then, would have been the position of the original Plaintiff, as between himself and his mortgagee, and as between himself and the other shareholders? As between himself and his mortgagee there would have been an obligation to bring back at least 2s. 6d. in the pound; and the difficulty might perhaps have been surmounted by making the relief conditional upon the refunding; but how could the difficulty have been surmounted as between the Plaintiff and the other shareholders whom he has assumed to represent? How could the Plaintiff have compelled the other shareholders to refund the sums which they had received? Each of them must at least have had the right to elect whether he would abide by the transaction, and retain the monies which he had received, or impeach the transaction and refund those monies; and what right could the original Plaintiff have to make this election for others? Each shareholder would, as I conceive, in this respect have had a several right, and the bill, purporting as it does to proceed upon a common right in all, could not, as I think, have been maintained by the original Plaintiff, even if the objection to the frame of the suit had rested upon this point only. But several other points, leading to the same result, were brought forward in the argument on the part of the Defendants; and some of them were not, I think, less fatal to the right of the Plaintiff to sue on behalf of himself and the other subscribers. These objections, indeed, were scarcely attempted to be answered on the part of the Plaintiff; and the conclusion at which I have arrived upon this part of the case is, that, without reference to the question of merits, this bill could not have been maintained by the original Plaintiff.

It is to be considered, then, what was the effect of the order for the prosecution of the suit by the official mana-

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ger. This order was obtained under the provisions of the statute 11 & 12 Vict. c. 45, s. 53.

It was insisted, on the part of the Defendants, that the case did not at all fall within the provisions of the 53rd section of the statute; and I think it would be difficult to answer some of the arguments which were urged upon that point, particularly with reference to the character of the suit, as instituted on behalf of scripholders and shareholders, and not on behalf of all, but of all except the Defendants. I do not, however, think it necessary to give any opinion upon the question whether the case falls within the provisions of the section. What the official manager has to make out in order to entitle him to maintain the suit is, that he has a better right than the original Plaintiff had; and I am of opinion that he has not any such better right. That, when he becomes Plaintiff in the suit, he must be taken to adopt it with all the imperfections and infirmities which attached upon it at the time when the order by which he was substituted was obtained. According to the provisions of the section, he is "thenceforward to prosecute" the suit "in the same manner, and with the same effect, to all intents and purposes, as if" the suit "had been commenced by the official manager as Plaintiff under the provisions of this Act" (a). But what he is to prosecute is the original suit; and by that or any amendment of it, which the state of the cause may enable him to make, he must, I think, abide. To construe the words 'as if such suit had been commenced by him' as freeing the suit from objections to which it would have been open if carried on by the original Plaintiff, would, I think, be a most forced construction, and might lead to the most palpable injustice. Upon such a construction Defendants might find themselves called upon, at the hearing of the cause, to encounter equities which they would have had

(a) Sect. 53.

no opportunity of meeting. In my opinion, it would require the strongest proof of an intention on the part of the legislature to warrant the Courts in adopting such a construction; and I can find nothing in the Act which at all tends to the conclusion that the legislature had any such intention.

I am of opinion, therefore, that, independently of the merits of the case, this bill must be dismissed. But the merits of the case so materially affect the character of the parties, and the question of costs, that I have felt it my duty to look into them.

[His Honour then stated the case made by the bill, which was to this effect:—The Company's scrip certificates were printed with blanks for the numbers of the shares and the names of two directors, and of the secretary, by whom they were to be signed and countersigned. These certificates were bound up in books, with counterfoils, each book containing certificates for several thousand pounds. The directors signed their names to the certificates, and put their initials to the counterfoils, and then handed back the books to the secretary, who countersigned the certificates when issued. The signature of the certificates occupying considerable time, the directors occasionally took the scrip books home with them for the purpose. *Harman* became secretary in November, 1845, in the place of one *Stanway*. At this time the scrip book No. 39, containing 2000 shares, was in the hands of *Brodie*; the certificates in which had been signed by *Harrison*, or some other director, but not by the secretary. The bill stated that the book remained in *Brodie's* possession, and was never returned to the office of the Company; that *Harrison* was an intimate personal friend of *Brodie*; and that he and *Brodie* had generally, at the conclusion of meetings of directors, been in the habit of remaining at the office along with *Harman* after all the other

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directors had quitted it; that the Plaintiff had lately discovered, that *Brodie*, *Harrison*, and *Harman* entered into a secret arrangement, by which they determined to make use of, for their own benefit and in fraud of the Company, the scrip certificates contained in the book No. 39. That they filled up the blank scrip certificates in the book, or the greater number thereof, as if they had been duly issued. That *Harman*, as secretary, signed them, and *Harrison* had also assisted *Brodie* and *Harman* in acts and proceedings which enabled them to practise the fraud upon the Company. That the scrip certificates so issued or made use of by *Brodie*, *Harrison*, and *Harman* were all filled up as scrip certificates for divers shares in the Company, amounting together to upwards of 1500 shares in the whole; and the same were all spurious scrip certificates, and were all cut from the missing book No. 39. That the requisition for the delivery up of the old certificates upon the payment of the dividend of 1*l.* 1*s.* per share, was a contrivance of *Harman* and *Brodie*, the better to enable them to defraud the Company by means of the spurious scrip certificates. The bill also charged, that, in addition to the genuine certificates of the Company which had been duly issued for 17,291 shares, the spurious certificates were alleged to have been presented at the office of the Company for payment of the dividend of 1*l.* 1*s.* per share; but that the same were not in fact actually presented by any one unless by *Harman* and *Brodie*, or one of them, for examination; nevertheless, *Harman*, with the knowledge and privity of *Brodie*, treated the whole of the spurious certificates as genuine, and procured the dividend of 1*l.* 1*s.* per share, to be paid thereon to him. That previously, or at the time of the examination of the certificates by the directors, *Harman* and *Brodie*, or one of them, caused the spurious certificates to be mixed with those that were genuine. That it appeared by the spurious certificates, that eighteen out of the twenty-four

parcels into which the same were divided, were marked with the initials of *Brodie*, as having been examined by him; and that, in order to pay the dividend of 1*l.* 1*s.* upon the spurious certificates out of the funds of the Company, twenty-four bankers' cheques, purporting to be drawn in favour of so many imaginary persons, who were represented as the owners of the spurious certificates, and (with one exception) for the exact sums which would have been payable for the dividend of 1*l.* 1*s.* per share if the scrip certificates had been genuine, were prepared by *Harman* for the signature of three of the provisional directors, and drawn upon the bankers, amounting to 156*l.* 10*s.* 3*d.* The bill charged, that *Brodie* signed twenty-three of those cheques; and that the Plaintiffs had lately discovered that all the twenty-four cheques were received by *Harman* and paid to the credit of his private account. That the loss which had been incurred by the Company by these payments in respect of the spurious scrip certificates, had been occasioned by the fraud of *Harman* and *Brodie*, and the wilful neglect and default of such of the other Defendants as signed the cheques. That, in order to conceal the real nature of the transaction with respect to the spurious scrip certificates, and to render the precaution of crossing the cheques ineffectual as a means of tracing the payment, *Harman* provided himself from time to time with cash whilst the dividend of 1*l.* 1*s.* was being paid, and on several occasions, when some genuine scrip-holders applied at the office for payment, *Harman*, when he handed to them the crossed cheques drawn in their favour, of his own accord, asked them if they would prefer to have cash, and then gave them cash, and thereby pretended to account for and explain the circumstance of the twenty-four cheques having gone to his private account. The bill charged, that, on the 2nd of October, 1846, there was a special meeting of the Company, at which certain persons were present, and, amongst them, *Brodie*. That, at that

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meeting, a long discussion arose as to the course to be pursued with respect to the fraud which had been practised on the Company; and it was resolved, that the matter should be kept secret. That the secretary requested to be instructed as to the course he should pursue, in case he should see Mr. *Galsworthy* (the solicitor of the Company) prior to the next meeting; and he was desired by the said committee not in any way to refer to the fraud above-mentioned, but simply to request that Mr. *Galsworthy* would forthwith send in his account. That *Harman* improperly received the dividends upon 200 shares. And as to the remuneration to the directors, the case made was, that it was not warranted by the subscribers' agreement.]

Such being the case made by the bill, several witnesses were examined for the Plaintiff. Giving the most full weight to their testimony, and, as I believe, more weight than it is justly entitled to, it amounts, I think, at the utmost to this,—that comparison of the certificates sent in with the share register book might have led, for I do not think the evidence goes so far as to shew that it would have led, to a discovery of some of the certificates being spurious. That all the spurious certificates were from the book No. 39, and that *Stanway* had not signed the certificates in that book; a point, however, on which his evidence is by no means satisfactory. That the book No. 39 was in November, 1845, in the possession of *Brodie*, and was not returned to the Company's offices, at all events up to February, 1846, and that *Harman* had known it to have been missing. That the scrip certificates, both genuine and spurious, were cancelled by cutting off the names of the directors and secretary who had signed them. That the spurious certificates were sent in in fictitious names; and that the cheques which were given for the payment of them, and some of the cheques for the genuine certificates,



went to *Harman's* private account at his bankers, *Harman* paying the dividends in cash. That the sums were drawn out by *Harman* from his bankers, whilst the dividends were in the course of payment as stated in the bill; and that the fraud which had been committed by the spurious certificates was concealed from the Company's solicitor. It may also be considered as proved by the Plaintiff's evidence, that the dividends upon the 200 shares were received by *Harman*; and that the subscribers' agreement did not warrant any charge by the directors for their services.

Taking this evidence at the highest, and looking at the charge of fraud contained in this bill, I think, that, if the case had to be decided upon the merits, the Plaintiff could not have obtained any decree grounded upon that charge; for, in the first place, as to the Defendant *Brodie*, and I have dealt with his case as being the one which was most relied on, and it is certainly the strongest in the Plaintiff's favour, I see nothing in the evidence which could justify the Court in considering him to have been a party to any such fraud as is alleged, nor indeed anything which could lead to the inference of his participation in any such fraud, beyond the fact of his having at some time had possession of the document by means of which the fraud was committed, and not having accounted for it; and I think it would be going beyond authority and beyond principle to hold, that a trustee could be charged for fraud, upon the mere ground, that the document by means of which the fraud was perpetrated had been in his possession and was not accounted for; and as to the case of wilful default on the part of this Defendant, which was pressed at the bar, I think that the bill does not raise the question, and that if it did it would be inconsistent with the case of fraud which is alleged. And in the second place, as to the Defendant, who, being merely the secretary of the Company, could not, as I apprehend, be charged

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upon any other ground than that of fraud, the evidence fails to shew that he ever had possession of the document by means of which only the fraud was or could be committed. But, whatever might have been the result as to this part of the case, if the question had depended only upon the evidence to which I have referred, some passages were read by the Plaintiff from the answers, which seem to me to remove all doubt upon the point. [His Honour stated the passages read from the answers of these Defendants, which shewed that they were not cognisant of the circumstances charged by the bill relating to the fraud until after it was committed; and also stated when they first became aware of it.]

I am of opinion therefore, that, if this case could have been determined upon the merits, the bill must have been dismissed as to the 1490 shares. I think it must also have been dismissed as to the directors' remuneration; for, as to this part of the case, the Plaintiff was driven to read the Defendants' answers which explain it; and, having regard to the charges in the bill, I think, that, whatever relief might have been given as to the other matters, these parts of the bill must have been dismissed, with costs.

To what extent any decree in respect of these other matters, if any could have been made, would have been serviceable to the Plaintiff, I am unable to judge; but, under the circumstances of the case, I feel it to be my duty to dismiss this bill wholly, with costs to be paid by the official manager; for, I find it alleged in the answers of some of these Defendants, that this suit was instituted by the gentleman who was formerly the solicitor of this Company, and that the original Plaintiff was indemnified by him; and, although that gentleman has been examined on the part of the Plaintiff, I do not find that he contravenes that allegation; and the character of his evidence satisfies

my mind, that this suit had its origin in other motives than the benefit of the shareholders of the Company. It is not within my province to decide whether the costs which the official manager will have to pay must or ought to be made good to him out of the assets of the Company; but, after having read these papers more than once, I have no hesitation in stating my opinion to be, that this bill contains charges which, looking at the evidence given in support of them, ought never to have been made; that the suit was improperly constituted in its inception; and that, whether it be looked at with reference to its frame, or upon its merits with reference to the principal question at issue, it ought never to have been adopted by the official manager. The bill must be dismissed, with costs, to be paid by the official manager.

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THIS Court doth order, that the Plaintiff's bill do stand dismissed out of this Court, with costs, to be taxed, &c. And it is ordered, that such costs, when taxed, be paid by the Plaintiff *William Turquand*, the official manager of the said Company, unto the Defendants, &c.

## MEMORANDA.

SHORTLY before Michaelmas Term, 1850, the Honourable Sir *Robert Monsey Rolfe*, Knight, one of the Barons of the Court of Exchequer, was appointed Vice-Chancellor, in the place of Sir *Lancelot Shadwell*, deceased; and in Michaelmas Term, 1850, *Samuel Martin*, Esq., one of her Majesty's Counsel, was appointed one of the Barons of the Court of Exchequer in his place, and afterwards received the honour of Knighthood.

In the same Term, Sir *Robert Monsey Rolfe* took the oaths as a Member of her Majesty's Most Honourable Privy Council; and, during the Sittings after that Term, was created a Peer of the United Kingdom, by the title of Baron *Cranworth*, of *Cranworth*, in the county of *Norfolk*.

In November, 1850, *Joseph Humphry*, Esq., one of her Majesty's Counsel, was appointed a Master in Ordinary, in the place of *John Edmund Dowdeswell*, Esq., resigned.

On the 28th of March, 1851, Sir *John Romilly*, Knight, her Majesty's Attorney-General, was appointed Master of the Rolls, in the place of Lord *Langdale*, resigned, and afterwards took the oaths as a member of her Majesty's Most Honourable Privy Council.

On the 31st of March, 1851, Sir *Alexander James Edward Cockburn*, her Majesty's Solicitor-General, was appointed Attorney-General; and *William Page Wood*, Esq., one of her Majesty's Counsel, was appointed Solicitor-General, and afterwards received the honour of Knighthood.

On the 7th of April, 1851, *George James Turner*, Esq., one of her Majesty's Counsel, was appointed a Vice-Chancellor, in the place of *Sir James Wigram*, resigned; and he afterwards took the oaths as a Member of her Majesty's Most Honourable Privy Council, and received the honour of Knighthood.

In October, 1851, the Right Honourable *Sir James Lewis Knight Bruce*, and the Right Honourable Lord *Cranworth*, were appointed Lords Justices of the Court of Appeal in Chancery; and *Richard Torin Kindersley*, Esq., one of the Masters in Chancery, and *James Parker*, Esq., one of her Majesty's Counsel, were appointed Vice-Chancellors, and received the honour of Knighthood.

*James Campbell*, Esq., *Thomas Chandless*, Esq., *William Elmsley*, Esq., *John William Willcock*, Esq., *Walter Coulson*, Esq., *William Thomas S. Daniel*, Esq., *John Baily*, Esq., *Brent Spencer Follett*, Esq., *William Bulkeley Glasse*, Esq., *Richard Davis Craig*, Esq., *James Anderson*, Esq., *Charles John Hargreave*, Esq., *Thomas Emerson Headlam*, Esq., *Robert Ingham*, Esq., *Graham Willmore*, Esq., *Frederick William Slade*, Esq., *John George Phillimore*, Esq., *John Mellor*, Esq., *Samuel Warren*, Esq., *R. Pashley*, Esq., *G. W. Bramwell*, Esq., *W. Atherton*, Esq., and *Hugh Hill*, Esq., were appointed of her Majesty's Counsel.

*Richard Bethell*, Esq., one of her Majesty's Counsel, was appointed Vice-Chancellor of the county palatine of *Lancaster*, on the resignation of *Sir William Page Wood*, her Majesty's Solicitor-General.

In Hilary Vacation, 1852, Lord *Truro* resigned the Great Seal, which was thereupon delivered to the Right Honourable *Sir Edward Burtenshaw Sugden*, who was created a Peer of the United Kingdom, by the title of Baron *St. Leonard's*, of *Slaugham*, in the county of *Sussex*.

At the same time, Sir *Alexander James Edward Cockburn* resigned the office of Attorney-General, and was succeeded by Sir *Frederick Thesiger*; and Sir *William Page Wood* resigned the office of Solicitor-General, and was succeeded by Sir *Fitzroy Kelly*.

In the same Vacation, *Charles John Crompton*, Esq., was appointed one of the Judges of the Court of Queen's Bench, in the place of Sir *John Patteson*, resigned.

In the long Vacation of this year, Sir *James Parker*, Vice-Chancellor, died, and *John Stuart*, Esq., one of her Majesty's Counsel, was appointed Vice-Chancellor in his place.

Shortly before Hilary Term, 1853, Lord *St. Leonard's* resigned the Great Seal, which was thereupon delivered to Lord *Cranworth*. The Right Honourable Sir *George James Turner*, Knight, Vice-Chancellor, was appointed a Lord Justice of Appeal in Chancery, in the place of Lord *Cranworth*; and Sir *William Page Wood* was appointed Vice-Chancellor, in the place of Sir *George James Turner*.

In the same Vacation, Sir *Alexander James Edward Cockburn* was appointed her Majesty's Attorney-General, in the place of Sir *Frederick Thesiger*, resigned; and *Richard Bethell*, Esq., was appointed Solicitor-General, in the place of Sir *Fitzroy Kelly*, resigned.

In the same Vacation, *William Milbourne James*, Esq., was appointed Vice-Chancellor of the county palatine of *Lancaster*, on the resignation of *Richard Bethell*, Esq., her Majesty's Solicitor-General.

In Hilary Vacation, 1853, *William Milbourne James*, Esq., was appointed of her Majesty's Counsel.

**APPENDIX**

**OF**

**Cases on Chancery Procedure,**

**DECIDED IN AND AFTER**

**MICHAELMAS AND HILARY TERMS, 16 VICT.,**

**BY**

**THE RIGHT HON. SIR GEORGE J. TURNER, KNT.,**

**AND**

**SIR WILLIAM PAGE WOOD, KNT.,**

**VICE-CHANCELLORS :**

**WITH**

**SOME NOTES OF CASES DECIDED IN OTHER BRANCHES OF THE COURT.**





It is intended, in this Series of REPORTS, to publish, as early as possible, in the form of an Appendix to each Volume, the Leading Decisions in this Branch of the COURT OF CHANCERY, which regulate or illustrate the New Pleadings and Practice of the Court, instead of blending them, as heretofore, with the Cases relating to the Principles of the Equity and Law which the Court administers.

The great changes, which, in carrying out the Acts of the last Session, must be made in all the forms and modes of proceeding, the difficulty—it may probably be said impossibility—of providing before-hand Orders which shall govern the multitude of Cases that will arise in the adaptation of new and untried systems of Pleading and of Proof, and the necessity which follows of gathering the Rules of Procedure from time to time as Cases arise, appeared to the Reporter to render it the duty of those to whom the Judges have confided the task of making known their decisions, to publish such as relate to Procedure more promptly, and in a more condensed shape, than was necessary when the business of the Court was pursuing its established and accustomed course. To this end, the Reporter intends, until the new

forms shall be known and understood, to render this APPENDIX, as far as possible, a Repertory of the Practice, by adding, in Notes, References to all the important Cases on the same subject which can be found in other publications.

A few Cases which arise out of the old Practice are given; but it is believed that none have been inserted on points which are obsolete, and none, with the exception of those relating to the adaptation of the New Practice to old Suits, which are not likely to be permanently applicable to the business of the Court.

The Reporter has also availed himself of the means which the publication of these Cases in a more concise form has afforded him, of adding some dicta on points of frequent occurrence, although not connected with any late change in Procedure; but which, the inquiries that are often made, and the misapprehension that sometimes is observed to occur, lead him to believe it will be convenient to the Profession to make more generally known than they appear to be.

T. H.

6, NEW SQUARE, LINCOLN'S-INN,  
29th Dec. 1852.

# APPENDIX.

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No. I.

## Cases on Chancery Procedure

DECIDED IN

MICHAELMAS TERM, 16 VICT. AND THE FOLLOWING  
SITTINGS.

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### Abstract.

IN a suit for specific performance by the vendor against the purchaser, when the first question is on the contract, and the Court declares that the vendor is entitled to specific performance of the contract, and the purchaser then insists that no title has been shewn, the Court may proceed to determine whether the purchaser is entitled to any further abstract, or let the cause stand over to be argued on that question, on a day to be named; and if the Court decides that the purchaser is entitled to a further abstract, the cause must again stand over, affording him the opportunity of taking any objection that may arise on that abstract: *Keyes v. Heydon*, (App. p. lviii).

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### Accounts and Inquiries.

SAUNDERS *v.* WALTER—*Nov.* 12<sup>th</sup>, 1852.

THE cause was on further directions.

Mr. *Rolt* and Mr. *V. Neale* for the Plaintiffs; and

Sir *W. P. Wood* and Mr. *Dickinson* for the Defendants.

Mode of prosecuting and of acting upon the result of accounts and inquiries, by the Chief Clerk.

It became a question, whether the amount of the residue had been accurately computed upon the report.

The VICE-CHANCELLOR said, the cause should stand over for a week, to ascertain that fact.

Mr. *Rolt* inquired, whether an order would be drawn up, indicating the question on which the case was adjourned, or whether a note would be taken of the question in the Registrar's book, or whether it would be sufficient for the counsel in the cause to make a minute of the point on their briefs.

The VICE-CHANCELLOR said, the Registrar would take a note that the case stood over to ascertain the fact in question, i.e., whether the finding in the report as to the residue was correct, or in what respect it was deficient, in the same way as applications for the re-investment of money in Court had been ordered to stand over, until the opinion of the Conveyancing Counsel on the title had been taken (a); and he (the Vice-Chancellor) would also write a note (not necessarily in any special form) pointing out the question to be ascertained, which the solicitor in the cause would deliver to one of the Chief Clerks of this branch of the Court, for his guidance.

Mr. *Rolt* suggested, that the apportionment of the residue amongst the parties entitled might be made at the same time and the case disposed of.

VICE-CHANCELLOR:—Not at present. When the case is before the Court again I may possibly be able, upon the evidence, to apportion the residue, without a certificate by the Clerk; or, if not, I may order the Accountant-General to act upon the certificate of the Clerk.

Mr. *Dickinson*.—It is important to ascertain also, how much of the present residue consists of principal and how much of interest; and it may be necessary to inquire, of what the residue now consists.

VICE-CHANCELLOR:—I can add those inquiries in Chambers, if I find it necessary.

Mr. *Dickinson*.—It may be necessary to have some authentic minute for the government of the Clerk as to the inquiries to be made.

(a) See *In the matter of Coddick's Settlement*, (App. p. ix.)

VICE-CHANCELLOR:—No other than that which I have written. I do not refer you to the Clerk, but I postpone this part of the case to be examined by myself in Chambers, with the assistance of the Clerk.

### Account of Personal Estate.

In the Matter of the PERSONAL ESTATE OF JANE CATLING, an  
Intestate—Nov. 4th, 1852.

MR. KINGLAKE, for the administrator, applied, under section 19 of Sir G. Turner's Act (13 & 14 Vict. c. 35), for an order to take the common accounts of the testator's estate.

The VICE-CHANCELLOR, upon the production of an affidavit that the intestate had been dead a year, and that no proceedings were pending, made the order in the form prescribed by the schedule to the Act, varying its terms from "It is ordered that it be referred to the Master, &c." (a), to "It is ordered that an account be taken," &c.

(a) See 15 & 16 Vict. c. 80.

Evidence in support of the application by executors, under sect. 19 of the statute 13 & 14 Vict. c. 35, to take the accounts of the personal estate of a deceased person; and form of the order of reference to take such accounts.

### Affidavit.

In the Matter of BARONESS BRAYE—Nov. 22nd, Dec. 1st, 1852.

MR. KENT, for the petitioner, on a petition for the payment to a tenant for life of dividends arising from a sum of money paid into Court, under the Lands Clauses Consolidation Act, applied to the Court for a direction to the Registrar to deliver out the order without the affidavit of title, which was required. The petitioner was a lady of 80 years of age, and from whom such an affidavit could not be obtained without exposing her to great personal inconvenience, amounting in fact to an insuperable

persons, is necessary in cases where application is made for payment out of Court of the fund, and not on applications by tenants for life for the dividends only.

The affidavit required under the Exchequer order, of the exclusive title of the petitioner to funds paid into Court, as the produce of lands, &c., taken by public bodies from incapacitated

The Court has settled a form of affidavit on the model of a carefully prepared answer to a searching interrogatory to books and papers, and which affidavit, though not obligatory, will be considered satisfactory: *Rockdale Canal Company v. King* (15 Beav. 11). And see Beavan's *Ordines Cancellariorum*.

ble obstacle to her obtaining the dividends. He submitted, that the general rule, which required such an affidavit, was applicable to cases where the party claimed to be absolutely entitled to the fund, and not to the case of interim payments, to be made to a tenant for life. The authority acted upon in the Registrar's Office is contained in an Order of the Court of Exchequer, of the 4th of July, 1828, and which was communicated in a letter from the Lord Chancellor to the Senior Registrar of the Court of Chancery, dated the 12th of February, 1842, and is in the following words:—"In all Petitions under Acts of Parliament for the sale of property for public purposes, when the purchase money is directed by the Act to be paid into this Court, the petitioners claiming to be entitled to the money so paid in must in addition to the usual affidavit verifying their title, make oath 'That they believe they have a good title, and are not aware of any right in any other person, or of any claim made by any other person, to the sum of £——, in the petition presented by them in this matter mentioned, or any part thereof.'"

The VICE-CHANCELLOR, after having made inquiry respecting the practice, said, he was of opinion that the Order referred to applied only to petitions for payment out of Court of the capital of monies paid in under the Acts, and did not apply to applications by tenants for life for payment of the dividends only.

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### Amendment.

A PRINTED bill, in which a party had been described by the Christian name of "*Maria Constantia*," instead of "*Constantia Maria*," and which had been altered by the Plaintiff's solicitor, by transposing the two words,—striking out "*Maria*" before, and writing it in ink after, "*Constantia*," was ordered to be filed by the Clerk of Records and Writs,—though, in its altered state, not wholly printed,—the Court guarding the order, by observing, that it would not be extended to sanction any extensive or important alteration in the printed document, or any alteration which would affect its legibility: *Yeatman v. Mousley*, 20 Nov. 1852, (16 Jur. 1004).

When the Plaintiff has obtained an order for the service of Defendants out of the jurisdiction, fixing periods for their appearance, the indorsement on the printed bill or claim may be altered with reference to the time so fixed: *Chalfield v. Bercholdt*, (App. p. xviii).

## Approval of Purchases and Titles.

In the Matter of CADDICK'S SETTLEMENT—*Nov. 8th, 1852.*

A PETITION for the reinvestment in land of 2500*l.*, which had been paid into Court by a Railway Company under the Lands Clauses Consolidation Act, as the purchase money of settled lands taken by the Company.

Approval by the Court of purchases for the re-investment of monies in land, &c., and of the title to the property so purchased.

Mr. *Milman*, for the petition.

The VICE-CHANCELLOR required, first, to be satisfied by affidavit that the purchase proposed to be made was a fit and proper investment of the fund; and, having been satisfied by the evidence on that point, directed a note to be taken by the Registrar that the Court approved of the proposed purchase; and that the petition was to stand over until the opinion of one of the Conveyancing Counsel (*a*), as to the title, should be produced. His Honour intimated that it was not necessary that any order of reference should be drawn up; and that, for the present, the petitioner might select one of the Conveyancing Counsel at his option (*b*).

It was this day stated to the Court that the title had been submitted to Mr. *Hayes* (*c*), who had made some requisitions upon it, which had been answered; and that Mr. *Hayes* had given a second opinion approving of the title, subject to searches for judgments. Those searches could not be finally made until the time of the completion of the purchase.

*Dec. 23rd.*

VICE-CHANCELLOR:—Is the statement of the approval of the title by Mr. *Hayes* verified?

Counsel for Petitioner:—I am instructed that the document which I now have is the opinion of Mr. *Hayes*; and that the signature is his signature.

VICE-CHANCELLOR:—The approval of the title must be verified by affidavit; and, upon that having been done, the Registrar

(*a*) Stat. 15 & 16 Vict. c. 86, s. 56.

(*b*) The rotation of reference to the several Conveyancing Counsel has since been settled by the General Order of the 16th of December, 1852; leaving

however to the Judges the power of deviating in special cases from the prescribed routine.

(*c*) One of the Conveyancing Counsel appointed by the Lord Chancellor.

will take a note that the Court is satisfied of the point of title; and that the petition is ordered further to stand over, that the Conveyancing Counsel may settle the draft conveyance.

Counsel for the Petitioner:—Will the Court now make the order prospectively for payment of the money on the purchase-deed being settled by the Conveyancing Counsel.

VICE-CHANCELLOR:—No. The case must be mentioned again, when the deed is prepared for execution.

### Charity.

PETITION for a scheme under Sir Samuel Romilly's Act ordered to stand over, and the Judge in Chambers to be attended with the scheme, serving the Attorney-General with the summons: *In the Matter of Hanson's Trust* (App., p. liv).

On the mode of settling a scheme in Chambers: *Attorney-General v. Atwood*, Vice-Chancellor *Stuart*, 2 Dec. 1852, (L. E.).

### Claim.

EWINGTON v. FENN—Dec. 21st, 1852.

Case in which a writ of summons upon the Master's certificate, given under the Order 18, of the 22nd April, 1850, is not the proper mode of bringing new parties to a claim before the Court, but another or supplemental suit is necessary.

AN order upon a claim for the administration of an estate was made against the surviving executor only. In the Master's Office, it appeared that a deceased executor had received assets, for which it did not appear that he had accounted.

The VICE-CHANCELLOR said, that the case was not one in which the executors of the deceased executor could be brought before the Court by writ of summons, to be obtained under the Master's certificate, under the 18th General Order of the 22nd of April, 1850; and that the representatives of the deceased executor could only be made parties, by some original or supplemental suit.

A failure in establishing the case of the Plaintiff in a

Mr. *W. Morris*, for the Plaintiff.

claim is not, since the stat. 15 & 16 Vict. c. 86, a ground for giving him liberty to file a bill; for, in a proper case, the Court, under the 39th section of that statute, will direct a further and oral examination of the parties or witnesses, rather than leave the parties to further proceedings: *Wilkinson v. Stringer* (App., p. xxiii).



ANONYMOUS—*Dec. 23rd, 1852.*

THE Order 1, clause 8, of the 22nd of April, 1850, allows a claim for specific performance to be filed, in the case of "an agreement for the sale or purchase of any property." A claim for the specific performance of a contract to grant a lease is, therefore, special, and leave to file it is necessary.

A claim for the specific performance of a contract to grant a lease, is special, and leave to file it is necessary.

Mr. *Amphlett* for the Plaintiff.

Where an infant Defendant had appeared to a claim, the Court appointed a guardian ad litem to the infant, on the motion of the Plaintiff, without affidavit of service of the writ of summons: *Wood v. Logden* (App., p. xxvi).

### DEEDS.

HARVEY v. BROOKE—*Nov. 25th, 1852.*

A SUIT for the specific performance of a covenant for renewal of a lease, rendered necessary by the infancy of one of the parties, by whom the new lease was to be granted. The order directed the lease to be made and executed by all proper parties; and that the sum of 8*4*l., the fine upon such renewal, should be paid into Court in the suit. The cause was then directed to stand over, that the draft of the lease to be executed by the infant should be submitted to one of the Conveyancing Counsel. The draft, signed by Mr. *Jarman*, was afterwards produced, and contained a marginal direction to recite the declaration of the Court of the right of the Plaintiff to the renewal, and the order for paying the 8*4*l. into Court; and that the same had been paid into Court in pursuance of that order.

Manner of settling deeds to be executed by incapacitated persons under the decree of the Court, and upon the consideration of monies paid into Court.

Mr. *Simpson*, for the Plaintiff, said that a difficulty arose with regard to the recital, and the mode of obtaining the execution of the lease by the infant, from the fact that no order had been drawn up when the cause was ordered to stand over to settle the draft lease. Without an order of the Court made in that stage of the cause, there would necessarily be an imperfection on the face of the deed, for the recital suggested by the Conveyancing Counsel could not be introduced.

The VICE-CHANCELLOR said, that in this case two orders could not be avoided. The order declaring the right to renewal, and

for the payment of the fine into Court, might be passed as of this day, and the cause might then stand over to a future day. Upon the order now made being drawn up, and the payment made into Court under it, the order and the payment of the money might be recited in the deed; and upon the cause being again in the paper, the Plaintiff would be prepared with an affidavit of the correctness of the engrossment, and the certificate of the Accountant-General of the payment of the money; and the Court might then direct the Registrar to sign a memorandum, that the deed then produced is the deed which the infant Defendant is to execute.

Mr. *Anderson* and Mr. *Phillips* appeared for the other parties

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Ex parte RECTOR OF SOUTH COLLINGHAM—Dec. 22nd, 1852.

Settling purchase deeds for the re-investment of the monies of incapacitated persons, and payment out of Court of the purchase-monies.

THE Court approved of a purchase of lands for the re-investment of monies paid into Court for a portion of the glebe taken by a Railway Company, and directed a note to be taken by the Registrar of such approval, and that the petition should stand over for the draft conveyance to be prepared and settled by the Conveyancing Counsel.

Mr. *Woolley*, for the petitioner, asked whether an order would not be drawn up before the execution of the conveyance, that the vendors, who were not parties to this application, might be satisfied that the purchase-money was ordered by the Court to be paid.

The VICE-CHANCELLOR said, that the Court could not do more at present than let the petition stand over to settle the conveyance. When that had been done, the petition would be mentioned again, and such an order made as would provide for the completion of the purchase.

## Direction for Service of Decree or Order.

DE BALINHARD *v.* BULLOCK—*Dec.* 18th, 1852.

A CLAIM for the administration of the estate of an intestate, in which the minutes delivered out by the Registrar had directed the usual inquiry as to the next of kin, and proceeded to direct that, if all the next of kin should be found to be duly served with writs of summons, then the accounts were to be taken.

Mr. *Welford*, for the Plaintiff, applied to the Court to vary the order, so as to dispense with the service on several of the next of kin, who were known to be out of the jurisdiction of the Court. The 13th General Order of the 7th of August, 1852, provided, that the then existing practice of the Court with reference to serving writs of summons on claims should continue in force with respect to claims filed before the orders came into operation. In this case the claim had been filed before Michaelmas Term, but the order had been made since the commencement of the Term.

Mode in which the directions of the Court are obtained on the question of what parties are to be served with the order or decree, and as to which of the parties service may be dispensed with.

As to serving an infant with notice of the decree, under the 8th Rule, s. 42, stat. 15 & 16 Vict. c. 86: *Clarke v. Clarke*, before Vice-Chancellor *Stuart*, 23rd November, 1852, (L. T.)

VICE-CHANCELLOR:—The minutes of the order are not in the proper form, according to the present mode of proceeding. The form of order which was originally adopted on claims, directing what parties were to be summoned, and that, when such parties had been served, the accounts should be taken (*a*), are not now suitable to the case. In a case like the present, the Act tells you what you are to do. A suit for the administration of the estate of an intestate may be brought by or against one of the next of kin (*b*). And the decree simply directs an inquiry who were the next of kin of the intestate at the time of his death, and whether any of them are dead, and if so, who are their personal representatives; and then it goes on to direct that the accounts of the estate shall be taken. The General Orders of the Court which have been made, are well adapted to provide for any such difficulty as that which is represented to occur in this case. The Judge in Chambers is enabled to dispense with service of the decree (*c*) upon any party as to whom it shall appear to him, that, from absence or other sufficient cause (*d*), it ought

(*a*) See, for example, *Eccles v. Cheyne*, *supra*, p. 219.

(*b*) Rules 1 and 6, s. 42, stat. 15 & 16 Vict. c. 86.

(*c*) See Rule 8, s. 42, stat. 15 & 16 Vict. c. 86.

(*d*) Gen. Ord. 19 of the 16th of Oct. 1852.

to be dispensed with or cannot be made. The course is this: having ascertained who are the parties interested in the estate, upon the first summons before the Judge in Chambers to proceed with the decree, the Judge will consider any circumstances which may be brought before him, with reference to any of the parties, and direct who are the parties to be served, and whether service on any of them may be dispensed with.

### Dismissal of Bill.

WARWICK *v.* COX—*Dec. 21st, 1852.*

Dismissal of bills in which executors and trustees are parties, may be by consent, but not upon terms of an agreement between the parties, unless the Court has heard and sanctioned such terms.

MR. *BIRD*, for the Plaintiff, moved to dismiss his bill by consent, upon terms specified in an agreement between the parties. The Defendants were executors, and the terms referred to related to the distribution of the estate.

THE VICE-CHANCELLOR said, that applications of this kind were not unfrequent, in which executors and trustees had entered into agreements for the termination of suits. There was no doubt, that, if the Court made an order for the dismissal of a bill, to which executors or trustees were parties, upon the terms which the parties had agreed to, the terms of such an arrangement would be afterwards set up as having been sanctioned by the Court. The bill might be dismissed by consent, and the parties might carry out their arrangements out of Court; but, if they were to be made part of the order of the Court, the Court must be satisfied that the arrangement was proper for the executors or trustees to enter into.

PINFOLD *v.* PINFOLD—*Nov. 20th, 1852.*

Motion by the Defendant for the dismissal of the Plaintiff's bill for want of prosecution, ordered—upon the application of the Plaintiff, and upon affidavit that the Plaintiff had obtained the relief which he sought by his suit, and that any further proceedings would be unnecessary and useless, and that the Defendant was a pauper,—to stand over to give the Plaintiff liberty to move to dismiss his bill; and upon such motion the bill dismissed without costs.

THE bill was filed for an injunction to restrain waste by the Defendant, on property in his possession, to which the Plaintiff claimed title. The injunction was granted in 1851. The Plaintiff afterwards recovered the premises by ejectment against the Defendant, who, before trial, withdrew his plea, and allowed judg-

ment to go by default. The Plaintiff subsequently entered into possession of and sold the property. No other proceedings were taken in the suit; and, in November, 1852, the Defendant moved to dismiss, for want of prosecution.

Mr. *Sidney Smith*, for the Defendant, contended, that the only matter for consideration, on the motion to dismiss for want of prosecution, was the conduct of the cause; and that the Court would not go into the merits: *Stagg v. Knowles* (3 Hare, 241). It would be a source of great inconvenience to suitors, if they were, on every motion to dismiss, under the necessity of entering into affidavits, and trying the merits of the cause, or the question how it should be disposed of, if at the hearing. The Plaintiff ought to have made some substantive motion to stay proceedings.

Mr. *Bagshawe*, jun., relied upon the circumstances which were shewn by affidavit, as stated above, and contended that the Court would not give the Defendant costs. The affidavit also stated, as a reason for avoiding any further expense by the Plaintiff, that the Defendant was a pauper.

The VICE-CHANCELLOR said, that the suitors would be best protected by the interference of the Court, for the purpose of preventing the injustice of their being compelled to go into evidence in a cause, and proceed to the hearing, after the whole subject of the suit was at an end. He perfectly agreed with the principles stated in the cases which were cited, that, except in special circumstances, the Court would not, on motions to dismiss, enter into any considerations beyond those relating to the conduct of the cause. In this case, he thought it right to order, that the motion should stand over, to give the Plaintiff an opportunity of applying to stay proceedings in the cause.

Mr. *Bagshawe*, jun., moved that the bill might be dismissed, without costs.

Dec. 1st.

Mr. *Sidney Smith* opposed the motion, contending that the suit had been unnecessary and oppressive; and that the Defendant had been forced to proceed, by being attached for want of answer and committed to prison. He had afterwards been discharged

from custody, but the General Order made him liable to another attachment in eight days, if he had not answered.

Mr. *Bagshawe*, jun.—The attachment was before the Plaintiff had recovered, and whilst he had reason to believe the suit would be necessary to be prosecuted to a conclusion. The answer was unnecessarily put in after the Plaintiff had recovered by legal process.

The VICE-CHANCELLOR dismissed the bill, without costs.

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### Evidence.

GILL v GILBARD—Nov. 2nd & 8th, 1852.

THE same paper contained the affidavits of two persons, *A.* and *B.*, sworn before a Notary Public in the United States of America. There were certain erasures and alterations in the affidavit of *A.*

Mr. *Prendergast* moved that the affidavit might, nevertheless, be filed.

The VICE-CHANCELLOR said, he was not aware that there was any authority for allowing an affidavit, which had been altered, to be filed, without proof that the alteration was made before the affidavit was sworn.

Application was subsequently made to the Court to expunge that part of the document which contained the alterations and erasures, and allow the rest to be filed.

The VICE-CHANCELLOR ordered the document to be filed as the affidavit of *B.*, rejecting the affidavit of *A.*

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In the Matter of NEDDY HALL'S ESTATE—Nov. 3rd, 1852.

Extracts from  
parish registers  
of entries  
of marriages,

baptisms, and burials, purporting to be signed by the incumbents of the respective parishes, received in evidence, without further verification, under the statute 14 & 15 Vict. c. 99, s. 14.

MR. FORSTER, for the petitioners, who sought to obtain payment of monies out of Court, tendered, as evidence of marriages,

Attendance of the Plaintiff and a witness who had made affidavits in the cause for oral examination, ordered, under the 39th section of stat. 15 & 16 Vict. c. 86, at the hearing of a claim founded on a legal demand, where, prior to that statute, the Court would have given the Plaintiff liberty to bring an action: *Deaville v. Deaville*, (App. p. xxii).

baptisms, and burials, the proof of which was necessary to the petitioners' title, divers extracts from parish registers, signed by the incumbents of the respective parishes, and certifying that the extracts respectively were truly copied by them from the registers of the respective churches. He referred to the Law of Evidence Amendment Act (14 & 15 Vict. c. 99, s. 14), and submitted that the Court would receive the extracts, thus attested, as evidence, without any further verification. The statute provided as a security, that any person who shall forge the signature, &c., or tender in evidence a document with a false signature, shall be guilty of a misdemeanour, and be liable to seven years transportation (s. 17). In a case before the late Vice-Chancellor *Parker* (*In re Carwell* (a)), an extract, made by the incumbent, or alleged incumbent, of a church at Montreal, was refused, on the ground that the Act did not extend to the colonies; but his Honour expressed no doubt that such an extract, under the hand of the incumbent of a church in this country, would be received without further proof.

The VICE-CHANCELLOR said, that the change in the practice as to the proof of the extracts from the parish registers, which was involved in the reception of the signatures of the alleged incumbents as sufficient evidence alone, was one of such extensive consequence, that, this being the first case, he preferred that it should be brought before the Lords Justices. If the question had been decided by the late Vice-Chancellor *Parker*, he should have followed that authority; but the point was not determined by the case referred to.

The LORDS JUSTICES, after referring to the statute, 52 Geo. 3, c. 146, on the point as to the officers with whom the custody of the parish registers was entrusted, directed that the extracts should be received (b).

(a) Not reported.

(b) See *In the Matter of Mahon's Trust*, supra, p. 459, where an affidavit sworn before a Master Extraordinary

of the Court of Chancery of Ireland,—without the authentication of his official character, was received.

## CROFTS v. MIDDLETON—Nov. 26th, Dec. 6th, 1852.

Case in which a Plaintiff was held not to be entitled to take the evidence of a witness on his behalf by affidavit, under the 36th section of the statute 15 & 16 Vict. c. 86.

Appointment of an Examiner to take orally the evidence of a witness residing out of the jurisdiction of the Court.

MR. *E. F. SMITH* moved, under the 36th section of the Act, 15 & 16 Vict. c. 86, that the Plaintiff might be at liberty to take the evidence of *John Beale*, as a witness in the cause, by affidavit, and that such affidavit might be used by the Plaintiff at the hearing and in all subsequent proceedings. It appeared that there were two Defendants, *Beale* and *Middleton*, who were not the parties principally interested in the subject of the suit, but whose evidence was required as witnesses. Both had put in their answers, *Beale* admitting, and *Middleton* denying, the case made by the bill. Issue was joined before the Act came into operation, but the parties had entered into an agreement that the evidence should be taken according to the provisions of the Act, and the General Orders of the 7th of August, 1852. *Beale* had gone to Australia.

Mr. *Prior*, for the Defendants, opposed the motion for taking the affidavit of *Beale* only, but was willing to consent that the affidavits of both *Beale* and *Middleton* should be received. The two witnesses would speak to matters which had occurred, and conversations which had taken place in their presence; with regard to which their statements differed: and the most satisfactory mode of examination would, perhaps, be *vivâ voce*, confronting them with each other. That being impossible, from the absence of *Beale*, the just course would be to apply the same mode of examination to each of them, and not to receive the affidavit of *Beale*, who could not, in that form, be cross-examined, while *Middleton*, the Defendants' witness, was examined and cross-examined orally.

Mr. *E. F. Smith*, in reply, said that the only mode of examination of *Beale* would be by commission, unless the affidavit were received. The 35th section enacted, that it should not be necessary to sue out any commission for the examination of witnesses "within the jurisdiction of the Court," which left commissions for the examination of witnesses abroad to be governed by the former practice.

Dec. 6th.

The VICE-CHANCELLOR said, that all the Judges of the Court, who had been consulted on this point, were of opinion that the



Court had power to appoint an Examiner for the examination of witnesses *vivâ voce* out of the jurisdiction of the Court; and he would in this cause appoint an Examiner in Australia. The parties might agree on the person to be named; or, if not, the Court would make the appointment. It was not a case in which the Plaintiff was entitled to have the evidence of his witness taken upon affidavit.

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SHERWOOD *v.* VINCENT—*Dec. 8th & 22nd, 1852.*

THE decree referred the cause to the Master to take accounts, and in the usual form directed the parties to produce all books and papers &c.; and that they should be examined upon interrogatories as the Master should direct. The Master, not being satisfied with the affidavit left by one of the parties, directed that he should be examined *vivâ voce*. The Examiner declined to proceed with the oral examination of the party until the opinion of the Court was taken.

The Court refused to direct the oral examination of a party to the cause under a decree which had been made, directing accounts and inquiries, before the new Procedure Act came into operation.

Mr. *Terrell* applied for the direction of the Court that the Examiner should proceed with the oral examination of the party.

The VICE-CHANCELLOR (after consulting the other Judges) refused the application.

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ATKINSON *v.* THE OXFORD, WORCESTER, AND WOLVERHAMPTON RAILWAY COMPANY—*Dec. 1st, 1852.*

MR. *BOVILL* moved (with consent) that publication in this cause (an old cause) might stand enlarged for two months, and that the evidence on both sides might be taken orally.

An application to enlarge publication, seeking also other directions, made in Court, and not in Chambers.

The VICE-CHANCELLOR made the order, observing, that if the application had been to enlarge the time only, it should have been made in Chambers (a).

(a) See Proceedings before the Judge in Chambers, art. 10.

## COOK v. HALL—Nov. 11th &amp; 17th, 1852.

The examination of witnesses de bene esse is to be taken orally, according to the mode of examining witnesses prescribed by the sections 30, 31, and 32 of the stat. 15 & 16 Vict. c. 86.

ON the 20th of October, 1852, the Plaintiff obtained the common order, by petition at the Rolls, for the examination of a

Case in which a Plaintiff having failed to give sufficient evidence, that a necessary party was out of the jurisdiction, the Court allowed the cause to stand over to enable him to give such proof according to the present practice of the Court: *Smith v. Edwards*, Nov. 4th & 9th, 1852, (16 Jur. 1041). See *Hughes v. Eades*, (1 Hare, 486); *Egginton v. Burton*, (Id 488, n.), as to supplying proof of such absence after the hearing.

An order for taking evidence under the Act and the General Orders, in a cause previously at issue, made on the application of the Plaintiff; and the costs (of the motion) ordered to be costs in the cause: *Cable v. Cooper*, Nov. 8th, 1852, (16 Jur. 169).

Motion for leave to prove the execution of a deed vivâ voce, the Court gave leave to prove the execution by affidavit: *Ball v. Carter*, M. R., Nov. 11th, 1852, (L. T.).

In a cause at issue before the new Procedure Act came into operation, and in which publication had been enlarged until a period which had not arrived, the Court, on the application of the Defendants, ordered that the evidence to be used at the hearing of the cause should be taken in the mode prescribed by the stat. 15 & 16 Vict. c. 86, and the General Orders of the 7th of August, 1852; and that, notwithstanding the Plaintiff stated that he had incurred expense in the preparation of interrogatories for the examination of his witnesses under the old system, no interrogatories having been filed: *M'Intosh v. Great Western Railway Company*, Nov. 11th, 1852, (16 Jur. 1012). See General Order 39 of the 7th of August, 1852.

As to the reception of an extract from the Register of Deaths kept at the Consulate of Madeira, and verified by the signature of the Consul and the seal of the Consulate: See *In re Forbes*, V. C. *Kindersley*, Nov. 16th, 1852, (L. E.).

The Court refused to direct the examination vivâ voce, before the Master, of a Defendant in a cause, in which the decree was made before the new Procedure Act came into operation: *Booth v. Tomlinson*, M. R., Nov. 19th & 22nd, 1852, (L. T.).

Order to examine witnesses vivâ voce, on the application of the Defendant in a cause at issue before the new Procedure Act came into operation, notwithstanding the Plaintiff desired to proceed under the former practice: *Howard v. Howard*, V. C. *Kindersley*, Nov. 23rd, 1852, (L. E.).

Order for the oral examination of a party in the cause before the Examiner, under special circumstances, where the decree was made before the new Procedure Act came into operation: *Hextall v. Cheattle*, Vice-Chancellor *Stuart*, 15 Dec. 1852, (L. T.).

On a motion to dissolve an injunction, and a cross motion to commit for breach of the injunction, the Plaintiff filed an affidavit, after the motion had been opened; but the Court rejected this affidavit, on the ground that it was only in special cases, and where the Court required information for its own satisfaction, that an affidavit filed at that period could be received; for otherwise a motion might be interminable. See *East Lancashire Railway Company v. Hattersley* (7 Hare, 86).

Mr. Bacon and Mr. Bewir, for the Plaintiff, then tendered the Plaintiff himself, who was in Court, for oral examination, claiming a right to examine him as a witness on the motion, under the 40th section of the stat. 15 & 16 Vict. c. 86. They contended, that the subpoena ad testificandum was not necessary, where the witness chose to attend without that process; and, being present, there was no reason for refusing his testimony.

Mr. Follett and Mr. W. M. James for the Defendants.

Vice-Chancellor *Kindersley* held, that the same reason on which the Court rejected the affidavit, applied to the rejection of the oral testimony of the witness; and that, if the Plaintiff had thought proper to open his motion before his evidence was ready, the Court would not stop the argument to enable him to complete it; and that, independently of that objection, the introduction of oral testimony on a motion, under the 40th section of the Act, must be procured by due service of the writ of subpoena in the ordinary way, upon an application to be made before the motion came on to be heard: *Smith v. Swansea Dock Company*, Vice-Chancellor *Kindersley*, Dec. 16th, 1852. (Ex relatione).

witness *de bene esse* (a); but the Act 15 & 16 Vict. c. 86, having since come into operation, a commission for the purpose of executing the order could not be obtained (s. 35).

Mr. *Pearson*, for the Plaintiff, moved that the Plaintiff be at liberty to examine *A. B. de bene esse*, and that *C.* (of *Cheltenham*), or, if he should not be able to act, *D.* (of *Cheltenham*) might be respectively appointed as Examiner. The Plaintiff desired, that, to save expense, the examination should take place at *Cheltenham*, where the witness resided.

Mr. *Cole*, for the Defendant, submitted that the provisions of the new Act did not apply to the examination of witnesses *de bene esse*. The directions in the Act, with regard to the examination of witnesses appeared to contemplate an open examination "in the presence of the parties, their counsel, solicitors, or agents" (s. 31). Whereas the examination *de bene esse* was always secret, and it was only published if the witnesses happened to be incapable of being examined at the proper time, when the cause was at issue; if the witnesses were then capable of being examined, the examination *de bene esse* was never published. There was nothing to prevent the commission from being sued out in the usual way; for the 35th section of the Act said only, that it should "not be necessary to sue out any commission." The Defendant objected also to the appointment of *D.*, as Examiner, in the event only of *C.* not being able to act. *D.* was the person named as the Defendant's Commissioner, and ought to be appointed as joint Examiner with *C.*

The VICE-CHANCELLOR, having consulted with other Judges of the Court, said, that the Court was of opinion, that the case of the examination of witnesses *de bene esse* was within the Act. The general clause on the subject enacted, that—"The mode of examining witnesses in causes," in this Court, "and all the practice of the Court in relation thereto, so far as such practice shall be inconsistent with the mode hereinafter prescribed of examining witnesses, and the practice in relation thereto, shall, from and after the time appointed for the commencement of this Act, be abolished" (Sect. 28). The clause afterwards proceeded to give the Court a discretion to examine any particular witnesses, either one

(a) See, on the subject of depositions taken *de bene esse*, *Forsyth v. Ellice*, 2 Hall & T. 424; *S. C.*, Macn. & G., overruling *S. C.*, 7 Hare, 290.

way or the other, upon interrogatories under a commission or *vis à voce*; but the latter mode of examination was the general method prescribed by the legislature, and which it was the duty of the Court to adopt, unless there were special reasons to the contrary. The circumstance, that the depositions taken *de bene esse* were not published, and would continue not to be published, was not a sufficient reason for departing from the general form of examination now to be used. The evidence would be known to the parties, but it would not be published or used.

The Court did not approve of the appointment of two Examiners: that would lead to increased expense, and was found oppressive under the former practice of the Court with regard to Commissioners (a). If the parties could not agree on one Examiner, proposals for the appointment of an Examiner must be laid before him in Chambers.

(a) See General Order 94, 8th of May, 1845.

### Examination *de bene esse*.

THE examination of witnesses *de bene esse* is to be taken orally according to the new practice: *Cook v. Hall*, *supra*.

### Examination of Witnesses orally at the Hearing.

DEAVILLE *v.* DEAVILLE—*Nov. 23rd*, 1852.

Attendance of the Plaintiff and another witness, for oral examination, ordered under the 39th section of stat. 15 & 16 Vict. c. 86, at the hearing of a claim founded on a legal demand, where, prior to that statute, the Court would have given the Plaintiff liberty to bring an action.

A CREDITOR'S claim. The executor disputed the debt, and it was suggested at the bar that there were circumstances of suspicion appearing on the face of the instrument put in by the Plaintiff, as evidence in support of the claim.

Mr. *Dickinson*, for the Plaintiff.

Mr. *W. Morris*, for the Defendant.

The VICE-CHANCELLOR said, the case was one in which, before the late statute, he should probably have given the Plaintiff liberty to bring an action; and he directed the case to stand over until the third day of Hilary Term next; and that the

Plaintiff and *William Deaville* (a witness, whose depositions by affidavit had been put in,) should attend on that day to be examined.

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WILKINSON v. STRINGER—Nov. 12th, 1852.

A CLAIM by the alleged purchaser for the specific performance of a contract for the sale of land. The contract in question was entered into by *Martin*, professing to act as the agent of the Plaintiff *Wilkinson*, and *Wildes* professing to act as the agent of the Defendant *Stringer*. Whether *Martin* was or was not authorised by *Wilkinson* to make the contract for the purchase on his behalf, *Wilkinson* adopted it. The defence was, that the Defendant *Stringer* had not authorised *Wildes* to enter into the contract for the sale. The affidavits on this point shewed that the contract was entered into and signed by *Wildes* and *Martin* on the 4th of February; that, on the following day, *Wildes* wrote to *Stringer* informing him of what he had done. It was stated that this letter was lost, and that no copy of it was preserved; but the affidavits of both *Stringer* and *Wildes* said, that it stated the contract to be subject to *Stringer's* approval. *Stringer* did not answer *Wildes'* letter until the 13th of February, when he wrote to *Wildes* and declined to sell the land on the terms contained in the contract; and spoke of communications which he had received, that the land was worth more money. This refusal to sell was immediately communicated by *Wildes* to *Martin*, but was not, as it appeared, communicated to *Wilkinson* until some time in March following; and during the whole of the intervening period it seemed that *Wildes* had expectations, which he communicated to *Martin*, that *Stringer* would be induced ultimately to adopt the contract. Both *Wildes* and *Stringer* positively deposed that *Wildes* had no authority to sell the land, and *Martin* did not, by his affidavit, distinctly say that *Wildes* represented himself to have such authority; but *Martin* stated that *Wildes* did not, on the occasion of entering into the treaty and contract on the 4th of February, say anything which induced him to believe that *Wildes* had no authority to sell the land. *Wilkinson*, soon after he was informed of the refusal of *Stringer* to adopt the contract, filed the claim.

The test for determining whether an oral examination of witnesses ought to be directed at the hearing of a cause, is to consider whether, if the cause had been heard upon evidence under the old practice, the Court would have seen sufficient ground for directing an issue on the fact in dispute.

Mr. *Rolt* and Mr. *Bovill* for the Plaintiff contended, first,

that the contract was, under the circumstances, binding on *Stringer*; or, secondly, if the Court thought the present evidence was insufficient, that *Wildes* and *Stringer* might be produced and examined orally, under the 39th section of the statute 15 & 16 Vict. c. 86.

Sir W. P. Wood and Mr. Webb, for the Defendant.

VICE-CHANCELLOR:—The question which arises on this claim is, whether *Wildes* was the agent of *Stringer*, and was, as such agent, authorised to enter into this contract, and thereby to bind *Stringer*; and I am asked, if, on the evidence before me, I cannot make a decree for specific performance of the contract against *Stringer*, that I would at least make an order for the *vivâ voce* examination of the Defendant and one of the witnesses under the new Chancery Procedure Act, so as to obtain further, and, as it is termed, more satisfactory evidence on the question of agency and authority. The true test in determining what ought to be done on such an application is to consider whether such a case is made out as that, if the suit had been commenced by bill, and the Defendant had answered, and then the parties had gone into evidence, the Court would have directed an issue to ascertain the fact denied by the answer, and on which the question in the cause turned. If, at the hearing of a cause, before the Act, the Court would not, upon the evidence, have seen sufficient ground to direct an issue, but would have dismissed the bill, the Court will not now direct the examination of witnesses, upon the chance of what might possibly come out upon such an examination. The question to be considered, with regard to the examination of the witnesses *vivâ voce* is, whether there is reason to suppose that the fact of the agency of *Wildes*, for this purpose, would be established by any further evidence, which the Plaintiff has not yet had the means of producing.

[The VICE-CHANCELLOR then went through the facts appearing upon the affidavits, and observed, that, as between *Wilkinson* and *Stringer*, they amounted to no more than this: that *Wildes* represented himself to be the agent of *Stringer*, which was denied; but the representation by *Wildes* could not bind *Stringer*. That the only other circumstance was the non-production of the lost letter from *Wildes* to *Stringer* of the 5th of February. As to this, it was positively sworn that it stated the agreement to have

been entered into subject to the approval of *Stringer*; and it was a corroborating circumstance in favour of the truth of this representation, that *Stringer* was, after the receipt of it, in communication with others on the subject of selling the property to other persons. He spoke of doing this in his letter of the 13th of February. On the 10th of February *Wildes* wrote a letter to *Martin*, as the agent of *Wilkinson*, in which he said he had no doubt of obtaining *Stringer's* confirmation of the sale; and on the evening of the same day there was a conversation, in which the same thing was mentioned, and acquiesced in by *Martin*. On the receipt of such a letter, or upon such a conversation, why did not *Martin* immediately say "What have I to do with Mr. *Stringer's* confirmation? You represented yourself to me as his agent, fully authorised: I accepted you as such agent, and Mr. *Stringer* is bound by your agreement." Instead of this, although, by the agreement of the 4th of February, the contract was to be completed on the 25th of March, there was no application for the delivery of the abstract, nor any step taken towards completion until long after the repudiation of the contract was known to the Plaintiff or his agents. The Plaintiff, if he wished to treat the objection of the Defendant as a nullity, ought to have done so at once.]

I think, therefore, that this is not a case in which, on bill and answer, and a replication filed and evidence to this extent only, the Court would have felt it necessary to direct an issue; and that, therefore, I ought not to direct an examination of witnesses *vivâ voce*, as asked by the Plaintiff. The claim must be dismissed; but, looking to the circumstances under which the contract was entered into, I shall dismiss it without costs.

Mr. *Rolt* asked, that the dismissal might be without prejudice to any bill to be filed by the Plaintiff: *Johns v. Mason* (supra, p. 35).

VICE-CHANCELLOR:—I think liberty to file a bill ought not to be given. I think the late statute opens a new view of that question. If I had thought that a case was made for the examination of witnesses, I should have examined them here, rather

A failure in establishing the case of the Plaintiff in a claim, is not, since the stat. 15 & 16 Vict.

c. 86, a ground for giving him liberty to file a bill; for, in a proper case, the Court, under the 39th section of that statute, will direct a further and oral examination of the parties or witnesses, rather than leave the parties to further proceedings.

CHATFIELD *v.* BERCHTOLDT—*Dec. 22nd, 1852.*

The indorsement on a bill or claim may, under the 3rd section of the stat. 15 & 16 Vict. c. 86, be varied, as circumstances require; and, therefore, when the Plaintiff has obtained an order for the service of Defendants out of the jurisdiction, fixing periods for their appearance, the indorsement may be altered so as to make the time specified in the indorsement correspond with the time allowed by the order.

MR. *TRIPP* moved for leave to serve several Defendants, out of the jurisdiction (*a*), with printed copies of the bill (*b*). Some of the Defendants were resident at *Naples*, others at *Pesth*, and others at different places in *Hungary*. The affidavit shewed the time occupied in the transmission of letters by the post to each of those places.

The VICE-CHANCELLOR said, he believed the proper times for appearance of Defendants out of the jurisdiction, in other parts of Europe, were fixed in the Registrar's office.

Mr. *Tripp* asked leave of the Court to amend the indorsement on the printed bill. It at present stood thus—"We command you and every of you, that, within eight days after service hereof," &c., "you cause an appearance to be entered" &c. It had been proposed to file the bill with the time on the indorsement left in blank, but the Clerk of Records and Writs had refused to receive the bill with any blanks in the indorsement.

VICE-CHANCELLOR:—This point has been brought before the Judges of the Court. The Act directs that the Defendant shall be served "with a printed bill of complaint or claim, with an indorsement thereon, in the form or to the effect set out in the schedule," "with such variations as circumstances may require." The form of the indorsement given in the schedule is applicable to all ordinary cases where the Defendants are within the jurisdiction. If the Defendants are out of the jurisdiction, and it is necessary to obtain an order of the Court fixing special terms of service, the indorsement may be altered, and the time fixed by the Court inserted instead of the eight days, or such other variation made as the circumstances may require.

(*a*) General Order 33, 8th of May, 1845.

(*b*) Sect. 3, stat. 15 & 16 Vict. c. 86.



## Injunction to Stay Proceedings at Law.

HOLME v. BROWN—Nov. 2nd, 1852.

MR. KINGLAKE moved to extend the common injunction to stay trial.

Mr. *Freeling*, for the Defendant, argued, that, the delay of the Plaintiff was an objection to granting the order. The action was brought in May; the Plaintiff in equity knew all the circumstances of his case, but he took no step in equity until October; and the Plaintiff at law was in a position to go to trial at the Sittings after Michaelmas Term: *Thorpe v. Hughes* (3 My. & Cr. 742), *M<sup>c</sup>Lane v. Ripley* (2 Mac. & G. 274), *Scotson v. Gaury* (1 Hare, 99).

The VICE-CHANCELLOR made the order, and said, it was true that the Plaintiff in equity could not, after having unnecessarily delayed his proceeding, come at the eve of the trial to extend the common injunction; but that rule applied where the trial was immediately proximate. In this case the trial could not come on until after the term, and the Defendant in equity might relieve himself from the injunction by putting in his answer.

An injunction to stay a trial at law will not be granted on the eve of the trial, where there has been delay on the part of the Plaintiff in equity in making the application; but the lapse of time before the application is made is not an objection to granting it, if the trial be not near.

On dispensing with the affidavit of merits (since the assimilation of the practice on common

and special injunctions) on the application for an injunction to stay proceedings at law by a party out of the jurisdiction, upon proof of such absence, and on service of the bill on the attorney in the action: *Ferguson v. Bevan*, Vice-Chancellor *Stuart*, Dec. 6, 1852, (L. E.).

## Interrogatories.

LAMBERT v. LOMAS—Nov. 13th, 1852.

A PLAINTIFF, who has filed a written copy of his bill under the stat. 15 & 16 Vict. c. 86, s. 6, may file interrogatories under s. 12, notwithstanding the time allowed for filing the printed copy has not expired, and he has not filed such printed copy.

Mr. *Amphlett*, for the Plaintiff.

## Issue.

THE test of determining whether an oral examination of witnesses ought to be directed at the hearing of a cause is, to consider whether, if the cause had been heard upon evidence under the old practice, the Court would have seen sufficient ground for directing an issue on the fact in dispute: *Wilkinson v. Stringer*, (App., p. xxiii).

## Judges of the Courts of Common Law.

HAY v. WILLOUGHBY—Nov. 11th, 1852.

Applications for the assistance of the Judges of the Courts of common law under the statute 14 & 15 Vict. c. 83, s. 8.

IN this case it was desired that the Court should have the assistance of one of the Judges of the Courts of Common Law under the Statute 14 & 15 Vict. c. 83, which (s. 8) enables either the Master of the Rolls or any of the Vice-Chancellors "to sit with the assistance of any Judge of either of her Majesty's Courts of Common Law at Westminster, upon the request of the Lord Chancellor, if any such common law Judge shall find it convenient to attend upon such request."

Mr. *Rolt* inquired whether it was necessary that he should make the application, on behalf of the parties, to the Lord Chancellor.

The VICE-CHANCELLOR said, it was not necessary; he would himself write to the Lord Chancellor, to ask his Lordship to request that the Court might have the assistance of one of the learned Judges (a).

(a) The case was heard before the Vice-Chancellor *Turner* and Mr. Justice *Wightman*, Dec. 11th, 1852, at Lincoln's Inn.

## Legacy Duty Act.

APPLICATION for payment out of Court to legatees of legacies paid in under the Legacy Duty Act, (36 Geo. 3, c. 52), to be made to the Judge in Chambers: *In the Matter of L. A. Batard*, (App., p. xliii).

## Letter of Attorney to receive Money out of Court.

WHERE the powers of attorney were of an old date, the Court, although the sums to be received are small, must be satisfied by recent evidence that the creditors who executed the powers are still living: *Bird v. Bird*, (App., p. xlv.)

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## Motion for Decree.

Cousins v. Vasey—Dec. 17th, 1852.

THE answers in the cause were filed before Michaelmas Term, and the Plaintiff, after the New Procedure Act came into operation, gave the Defendants a month's notice of motion for a decree, under the 15th section of the 15 & 16 Vict. c. 86, and the 22nd General Order of the 7th of August, 1852. Upon having given the notice the Plaintiff applied to the Clerk of Records and Writs for a certificate to the Registrars, that the cause was in a fit state to be set down for hearing, in order that the Registrars might set it down according to the 27th General Order of the 7th of August, 1852. The Clerk of Records and Writs doubted whether the case of a suit instituted before the New Procedure Act came into operation was within the provisions of the 15th and 16th sections, and the General Orders founded thereon.

A Plaintiff in a suit commenced by bill, before as well as since the stat. 14 & 15 Vict. c. 86, came into operation, may move for a decree under the 15th section of that statute.

Mr. *Prendergast*, stating the doubt which had been raised, moved *ex parte* that the Clerk of Records and Writs might be ordered to issue the necessary certificate that the cause was ripe for hearing.

The VICE-CHANCELLOR, after reserving the point for the consideration of the Judges, said, they were of opinion that the clause enabling a motion to be made for a decree applied as well to suits commenced before as since the Act came into operation.  
—*Ex relatione*.

## Next of Kin.

CASE in which the executors of a father who survived and became the sole next of kin of his deceased children, may be appointed by the Court under the 44th section of the 15 & 16 Vict. c. 86, to represent the estates of the deceased children for the purposes of the suit: *Swallow v. Binns*, (App. p. xlvii).

See the case of executors who had not proved the will: *Ex parte Cramer* (Id., p. xlvii).

## Parties.

DOODY v. HIGGINS—Nov. 8th, 9th, & 16th, 1852.

The testator, *JOHN ADAMS*, by his will, dated in 1811, devised unto his wife *Jane Adams*, and two persons named *Higgins* and *Masefield*, after giving the income of his residuary real and personal estate to A. for life, and, after her decease, to B. for life, directed his trustees then to sell his estates, and divide the proceeds amongst "the following persons, or their heirs, forever:—the grandchildren of C., the grandchildren of D., and the grandchildren of E.:"—*Held*, that the word "heirs" was to be construed heirs according to the nature of the property; and it being in this case given as money, "heirs" was construed "next of kin:" that the grandchildren of C., D., and E., living at the death of the testator, and afterwards born during the lives of the tenants for life, and the next of kin of any of them who predeceased the surviving tenant for life, were entitled to the residuary estate, the next of kin of each deceased grandchild taking the deceased grandchild's share: that the words "for ever" did not alter the character of the persons who were to take, the only import of such words being, that the persons who were to take took absolutely.

That the Court, being satisfied that neither the heirs-at-law nor the personal representatives of the deceased grandchildren had any reasonable ground of claim, it was not necessary to make them parties to the suit.

That the other grandchildren and the next of kin of the deceased grandchildren of the testator must be brought before the Court, on the further prosecution of the suit, by being served with notice of the decree under the 8th Rule of the 42nd section of the Act 15 & 16 Vict. c. 86.

Where an estate is to be sold under the decree of the Court, the general rule (with a possible exception in some cases of extreme difficulty) is, that all the parties interested in the proceeds must, to secure a proper and advantageous sale, and protect the title of purchasers from being open to inquiry or impeachment, be parties to the suit, or be served with notice of the decree under the 8th Rule of the 42nd section of the Act 15 & 16 Vict. c. 86.

The 51st section of the Act 15 & 16 Vict. c. 86, which empowers the Court to adjudicate on questions between some only of the parties, does not render the decision binding on the absent parties, as the 42nd section of the same statute does, when notice of the decree has been served under the 8th Rule.

The expense of ascertaining the kinship of the next of kin of the deceased grandchildren ought to fall upon the general estate of the testator, as such next of kin are, equally with the surviving grandchildren, his legatees; and therefore, as the number of grandchildren must be ascertained before the fund could be divided, it would be unjust to the next of kin of the deceased grandchildren that the inquiry should stop without ascertaining their kinship, thereby throwing the expense of such proof upon their shares of the fund.

A distinction between suits by creditors and suits by legatees is, that, in suits by creditors, where one sues on behalf of others, the law gives a power to the trustees to deal with the estate, which it does not give in the case of legatees.

A suit by creditors under a trust deed allowed to proceed against the trustees without a personal representative of the deceased debtor, the author of the trust, where no such representative existed, and his estate was insolvent: *Chaffers v. Headlam*, (App. p. xlvii).

their heirs and assigns, all his freehold estates, upon the trusts thereafter declared; and he bequeathed all his leasehold and personal estate to the same trustees, their executors, &c., upon trust, out of the rents, issues, interest, and profits, of all his estates, to pay the annuities therein mentioned; and the will proceeded as follows:—"I give and bequeath to my dear wife *Jane Adams* and *Elizabeth Bennett* her sister, or the survivor of them, at their own disposal, my share in the house I now live in, with the books, plate, linen, and furniture. I give and bequeath to my dear wife *Jane Adams* all the rest and residue of the income of my estates, freehold, leasehold, and all other my personal estates and effects, of what nature or kind soever, for her natural life; and after her decease, to her sister *Elizabeth Bennett*, if she is the survivor, for her natural life; and then, upon trust, for *Robert Higgins* and *William Masefield*, or the survivor of them, their heirs, executors, administrators, or assigns, shall and do absolutely sell the whole of my estates not before disposed of, and call in my securities to pay the following legacies." After specifying certain pecuniary legacies, the will continued:—"The residue of my estates I estimate at about 6000*l.*, which, be it more or less, it is my desire that it be divided equally, share and share alike, amongst the following persons, or their heirs, for ever: to the grandchildren of my uncle *John Adams*, late of *Church Aston*, deceased; also to the grandchildren of my uncle *Richard Wheatley*, late of *Newport*, deceased; also to the grandchildren of my uncle *Samuel Wheatley*, late of *Newport*, deceased." And the testator appointed his wife *Jane Adams*, *Higgins*, and *Masefield*, his executors.

*Jane Adams*, the widow, entered into possession of the rents and profits of the estate; and, upon her death, *Elizabeth Bennett* entered into possession of the rents and profits. *Elizabeth Bennett* died in January, 1852. After her death, and the death of the surviving trustee, the claim was filed by two of the grandchildren of *Samuel Wheatley* against *R. G. Higgins*, the heir-at-law and personal representative of the last survivor of the three trustees, *J. Walker*, the administrator de bonis non of the testator *John Adams*, and who was also a grandson of *Samuel Wheatley*, *C. Lawrence* the heir-at-law, and *Ann Lawrence* the personal representative of a grandson of *Richard Wheatley*, which grandson had survived the testator, and died in the lifetime of *Elizabeth Bennett*, and *W. Undrell*, the sole next of kin of a granddaughter of

*Samuel Wheatley*, which granddaughter survived the testator, and also died in the lifetime of *Elizabeth Bennett*. The claim stated that a share in the residuary real and personal estate of the testator was claimed by *J. Watkin* in his own right, as one of the grandchildren of *Samuel Wheatley*; a share by the Defendant *Charles Lawrence*, in his own right, as heir-at-law of *John Lawrence*, a deceased grandchild of *Richard Wheatley*; the same share by *Ann Lawrence*, as the legal personal representative of *John Lawrence*; and a share by *W. Undrell*, as next of kin of *Mary Undrell*, a deceased grandchild of *Samuel Wheatley*.

The Plaintiffs claimed to have the real estate of the testator sold, and the produce thereof and his personal estate administered.

Mr. *E. F. Smith*, for the Plaintiffs, submitted, that, as there were before the Court persons representing every class of the grandchildren, or of the real or personal representatives of grandchildren, who could be interested under the will of the testator, the Court might, under the 51st section of the stat. 15 & 16 Vict. c. 86, adjudicate on the question of construction, and direct the trust estate to be sold, without requiring the other persons or classes of persons interested to be made parties, either at the present hearing, or on the subsequent general proceedings. The 18th Order of the 16th of October, 1852, prescribed, that the Judge in Chambers "is to be satisfied, by proper evidence, that all necessary parties are to be served with notice of the order; and thereupon directions are to be given as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend," &c. And the 19th Order enables the Judge, if he shall think fit, to dispense with service upon any party. The persons now before the Court were the residuary devisees; and under the 3rd Rule of the 42nd section of the Act, (15 & 16 Vict. c. 86) one of such devisees might have a decree for the execution of the trusts, without serving the others, who were in the same position. Under these circumstances, and considering the great number of persons who had become interested in the trust, it was submitted, that, to save the expense of bringing in so many parties, and of shewing their repective titles or pedigrees, the Court would dispense with the service of the decree upon the absent parties, under the 8th Rule of the 42nd section of the Act.—*Harvey v.*

*Harvey* (4 Beav. 215), *Smart v. Bradstock* (7 Beav. 500), and *Batten v. Parfitt* (2 Y. & C. C. C. 343) were mentioned.

Mr. *Phillips*, for the Defendant *C. Lawrence*.

Mr. *Murray*, for *W. Undrell*.

Mr. *Denison*, for *J. Watkin* and *R. G. Higgins*.

Mr. *Russell*, for *Ann Lawrence*.

On the question of the construction of the will,—that heirs must be read as next of kin, *Gittings v. M'Dermott* (2 My. & K. 69) was referred to. On the point, whether the representatives of grandchildren dying in the lifetime of the tenant for life, took by substitution; or the word "or," should be read "and:." *Price v. Lockley* (6 Beav. 180), *Burrell v. Baskerfield* (11 Beav. 525), *Salisbury v. Petty* (3 Hare, 86), *Davenport v. Hanbury* (3 Ves. 257), *Montagu v. Nucella* (1 Russ. 165), and *Girdlestone v. Doe* (2 Sim. 225), were cited.

VICE-CHANCELLOR:—There are three questions in this case: first, who are the parties entitled to the residuary estate of the testator; secondly, whether the suit is properly constituted to enable the Court now to declare its opinion upon that question; and thirdly, whether it be necessary to bring other parties before the Court in the further prosecution of the suit.

The first question is, who were the persons intended by the testator to take under the disposition of the residue to "the following persons or their heirs." I have looked into the cases which were cited in the argument, and into many other cases upon this point; and I think that the words "or their heirs," must be construed as words of substitution; and that the word "heirs" must be construed heirs according to the nature of the property, that is, next of kin; the property being given as money to the persons intended to take. The true construction of this will, in my opinion, is, that the grandchildren of the three persons named, who were living at the death of the testator, and who were afterwards born during the lives of the tenants for life, and the next of kin of any of them who predeceased the surviving tenant for life, are entitled to the residuary estate; the next of kin of each deceased grandchild taking the deceased grandchild's share.

It was scarcely disputed, that this would be the proper construction if the disposition had been "to the following persons or

their heirs," simply, but it was attempted to found a distinction upon the addition of the words "for ever." Those words, however, seem to me to import no more than that the persons who are to take, take absolutely; and they cannot, I think, alter the character of the persons who are to take.

It was also argued, that the word "or" ought to be read "and;" and that upon that construction the personal representatives of the deceased grandchildren would be entitled. But I see no reason for altering the words of the will; and if the testator had intended the personal representatives to take, the words "or their heirs," might have been omitted altogether. That the heirs at law of the deceased grandchildren cannot in this case be entitled to take by the description of heirs is, I think, beyond all doubt.

The second question is, whether the Court is now in a position to declare who are the persons entitled; and I am of opinion that it is. The rule of the Court upon this subject is well laid down in *Bunnett v. Foster* (7 Beav. 540). If the Court is satisfied that the absent parties have no reasonable ground of claim, it will decide the question in their absence, and will not require that they should be made parties to the suit. It will not be necessary, therefore, either that the heirs at law, or the personal representatives of the deceased grandchildren, should be made parties to the suit.

The third and more difficult question is, whether it is necessary that other parties should be brought before the Court in the further prosecution of the suit. And after having very anxiously considered this question, with a view, if possible, to save expense to the parties, and after communicating with the other Judges upon it, I am of opinion that the other grandchildren, and the next of kin of the deceased grandchildren, must be brought before the Court in the further prosecution of the suit, by being served with notice of the decree, according to the New Procedure Act. The estate in this case is to be sold under the decree, and each of these parties has as much interest in its being properly and advantageously sold as the Plaintiffs themselves have. Common justice, therefore, seems to require that they should be represented in the sale. Again, it is of great importance that the titles of purchasers under the decrees of the Court should not be open to impeachment; and this can hardly be effected where the sale takes place in the absence of interested parties. The Court, indeed,



where it proceeds in the absence of parties, might, and, from what is to be found in the Lord Chancellor's "Treatise on the Law of Property," (p. 682), would, protect a bonâ fide purchaser under its decree; but surely the absent parties would have the right to inquire into the question of bona fides. It is true, that the same difficulties which present themselves in this case, equally apply to the case of a suit by creditors, where one is permitted to sue on behalf of himself and others; but it is to be observed, that the law in that case gives a power to the trustees to deal with the estate, which it does not give in the case of legatees.

I have examined the cases upon this subject in the hope that I might find some means of avoiding the necessity of bringing these parties before the Court; but I have found no case in which the Court has permitted one legatee, or one cestui que trust to represent the others, where the estate was to be sold under the decree, except the case of *Batten v. Parfitt* (2 Y. & C. C. C. 343), and the grounds of that decision do not appear. The case, however, was very peculiar in its circumstances, the legislature having enabled the distribution of the fund upon the petition of any party interested. In the other cases, in which accounts only were directed, there was not the same difficulty in proceeding in the absence of all the parties; for the Court would of course secure for the absent parties their shares of what was found due on the balance of the account; and if more was coming to them they might sue for it, as they were not bound by the accounts taken in their absence. I am not prepared to say that the Court would in no case proceed to a sale without all the parties interested being made parties to the suit; but I think it can be done only in extreme cases, and that it ought not to be done in this case.

It was urged, on the part of the Plaintiffs, that the expense and difficulty of ascertaining the parties ought to induce the Court to dispense with them; but it is manifest, that, at all events, the number of grandchildren must be ascertained before the fund can be divided; and it would be most unjust to the next of kin of the deceased grandchildren, that the inquiry should stop at that point; for then the expense of ascertaining their kinship would fall upon their shares, and not upon the general estate, as I conceive it ought to do, they being as much the testator's legatees as the surviving grandchildren.

It is right to observe, that there is now less reason for dis-

pending with the parties than there formerly was, as the legislature has provided an easy means of bringing parties before the Court, by serving them with notice of the decree; and the Orders enable the parties to be dispensed with in case of absence or other sufficient cause; and the parties who come in may be classed. It is to be observed also, in support of the view which I have taken of this case, that the 51st section of the Act, which empowers the Court to adjudicate on questions between some only of the parties, does not render the decision binding on the absent parties, as the 42nd section does, when notice of the decree has been served.

I think it right further to add, that the difficulty which presents itself in this case did not escape the attention of the Chancery Commissioners: it was much considered by them, and it was felt that the only effectual remedy would be to constitute a real representative, which was suggested by their Report.

GOLDSMID *v.* STONEHEWER—Nov. 11th, Dec. 15th, 1852.

Representation of cestuis que trust of real estate by the trustees, under Rule 9, s. 42, stat. 15 & 16 Vict. c. 86, in suits against them for foreclosure or sale, extended to the case of infant cestuis que trust, and to trustees of subordinate interests under settlements of shares of children in remainder, but not otherwise to adult cestuis que trust.

SIR W. P. WOOD and Mr. Goldsmid for the Plaintiff, in a claim for foreclosure, where it appeared by the affidavits that a second mortgagee of the estate, who was a Defendant, was a trustee for persons interested under marriage settlements, and who were not before the Court, submitted that the absent parties were sufficiently represented to be bound by the decree, under Rule 9 of sect. 42 of the Act 15 & 16 Vict. c. 86.

VICE-CHANCELLOR:—This is a claim for foreclosure by a first mortgagee against the mortgagor and the second mortgagee. Before the hearing of the claim the second mortgagee filed an affidavit, in which he stated that the second mortgage was held by him as the trustee of a marriage settlement, under which trusts were declared for the husband and wife for their lives, and for the children of the marriage in remainder; and that some of the shares of the children had been again made the subject of other settlements. The case was opened to the Court before the Act of the 15 & 16 Vict. c. 86, came into operation; and it then stood over at the request of the Plaintiff, that the benefit of the New Rules, with regard to parties, might be had. The question now is, whether, in order that a decree for foreclosure might be made, it is sufficient that the trustees of monies

secured by the second mortgage are parties without the cestuis que trust under the settlements being also parties. I have carefully considered the point, with the desire of relieving the Plaintiff, as far as it could be safely done, from the necessity of bringing the persons beneficially interested before the Court. It was suggested, that the Court might act on the principle which is applied in the case of executors, and which is now made applicable, in proper cases, to the trustees of real estate. If the mortgage had been made to the party, or become vested in him in the character of executor, it would be sufficient to make him a Defendant, without any of the persons beneficially interested; and the decree of the Court would bind all the persons who might be so interested: but there is this difference between the case of an executor and that of a trustee, that the executor has the control of the whole estate of his testator, whilst the power of the trustee is limited to the particular fund which is the subject of the trust, and he has not necessarily the control of any other funds. I think, therefore, that the Court should not, by a decree of foreclosure against the trustee only, without giving the cestuis que trust the opportunity of redeeming, foreclose all the parties interested under the settlements. Still, it is clear, that the infants and the trustees of the settlements which have been made of the shares of the children in remainder cannot reasonably be expected to be in a position to redeem the estate; and not having the means of redeeming the mortgage, I think it is not necessary they should be made parties. If the husband and wife, and the adult persons interested under the trusts of the original settlement are made parties, the order may be made.

Mr. *Goldsmid*, for the Plaintiff, said that the husband, who was tenant for life under the settlement, was the mortgagor, and was a party before the Court in that character. If it were necessary to re-serve him with the amended claim, for the purpose of making him a party to the suit, as one interested under the settlement, it would occasion great delay, as he was residing in Australia.

VICE-CHANCELLOR:—As he is already before the Court, you may proceed without serving him with the claim a second time. The order will necessarily give him the right of redemption.

in that character, and who, in such character, has a right given to him to redeem, is bound by the foreclosure, in respect of an interest which he may have as tenant for life under a settlement made of monies secured by a second mortgage of the same estate, although such latter interest be not stated on the claim. (See *Bromitt v. Moor*, supra, p. 374).

A mortgagor being a defendant to a claim for foreclosure,

## HANMAN v. RILEY—Dec. 20th, 1852.

Distinction as to the necessity of making persons beneficially interested in real estate parties in suits by mortgagees for foreclosure or sale of mortgaged estates, against the persons having the legal interest only, where such persons are executors of the mortgagor, and where they are merely trustees of settlements of the mortgaged property.

A CLAIM by the mortgagee of a term of 1000 years, against the executors of the mortgagor and the devisees in trust of the mortgaged premises under his will.

Mr. *Southgate*, for the Plaintiff, asked for a sale of the mortgaged property instead of a foreclosure, under the 47th section of the 15 & 16 Vict. c. 86, and to be admitted as a general creditor against the estate of the testator for such portion of the mortgage debt as the mortgaged premises might fail to realise: citing, as to the latter relief, *King v. Smith* (2 Hare, 239) (a). The Defendants were the executors and devisees in trust only. It had been thought that the cestuis que trust under the devise of the mortgaged premises might be dispensed with, under the provision of the 9th Rule of the 42nd section of the Act 15 & 16 Vict. c. 86.

Mr. *Metcalfe*, for the Defendants, said, that they were devisees of the fee of the mortgaged premises, and that the trusts thereof, and of the residuary estate of the testator, was to pay certain annual sums to his widow, and for the maintenance of *Rebecca Riley*, and to accumulate the rents and profits of the mortgaged premises until a sufficient sum was raised to pay off any mortgage that might be due thereon, and afterwards to apply the rents and profits for the benefit of *Rebecca Riley*, until she attained twenty-one, and then to pay the rents and profits to *Rebecca Riley*, for her life, for her separate use, and upon her decease, in trust for her children then living; and if there should be no children of *Rebecca Riley*, in trust for sale, with a direction to divide the monies to be produced thereby amongst six persons, named in the will. There was no present power of sale vested in the devisees. If the Plaintiff were content to sell the term of years, the Defendants, as executors of the testator, might possibly be enabled to deal with that portion of the estate; but they had no power to convey the fee.

VICE-CHANCELLOR:—The object of the Act in enabling trustees of real estate to represent the parties beneficially interested in such property, was to save the expense of bringing before the Court all the cestuis que trust, who generally, if necessary parties

(a) See *Typing v. Power*, Order on further Directions, 1 Hare, 412.

to the conveyance of the estate, were only so for the purpose of covenanting with the purchaser. The trustees convey to the purchaser the legal estate, and the Court deals with the purchase-money. In *Goldsmid v. Stonehever* (supra, p. xxxviii.), a claim for foreclosure was filed by the first mortgagee against the mortgagor and the second mortgagee, and the latter filed an affidavit shortly before the claim came on to be heard, stating, that he was a trustee for a great number of other persons, who, upon the decree of foreclosure, would be entitled to redeem. That was the case of a settlement, and not of a will; and I was of opinion, that, as the trustees would be in possession only of the settled funds, and not of funds applicable to the purpose of redemption, it would be proper to require that the tenants for life under the settlement, and the children who had attained twenty-one, should be made parties. This is the case of a will, in which the devisees in trust of the estate are also the executors, and are therefore the persons in whom any funds which may be applicable to the payment of the debts of the testator, and to the redemption of this estate, are vested. I do not think it will be necessary, therefore, in this case to make the cestuis que trust parties. The decree may be made in their absence.

I have had occasion to consider the form of the decree in a suit by a mortgagee against the estate of the deceased mortgagor, seeking also to enforce his security as against the mortgaged premises. The right of the mortgagee in that character, is foreclosure; and if he comes for that relief, and obtains foreclosure, he is satisfied. He has taken the estate for his debt. If, on the other hand, he comes against the general estate of the testator, he may possibly be satisfied out of the personal estate, as the primary fund for the payment of the mortgage debt, and may not need the application of the property comprised in his security. A decree therefore, founded, in the first instance, on relief directly against the mortgaged premises, by way of foreclosure, and also against the general estate, would be inconsistent. The decree, which it has appeared to me to be right in such cases, is to take an account of what is due to the Plaintiff for principal and interest on his mortgage, then to take the usual accounts of the personal estate, and of the debts; and if the personal estate should appear to be insufficient for the payment of the debts, then an account of the other real estate of the testator; and ascertain whether there are any and what incumbrances on the real estates,

Form of decree, in a suit by a mortgagee against as well the specific security as the general estate of his deceased debtor.

other than that of the Plaintiff. When the case comes back, it will be in a condition which will enable the Court to give the Plaintiff the benefit of his security, and also such right as he may have against the general estate. Order accordingly.

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DENSEM v. ELWORTHY—Dec. 23rd, 1852.

On a bill for the execution of the trusts of a will, directing the sale and distribution of the proceeds of real estate, framed according to the old practice, and bringing all the residuary devisees and legatees before the Court:—

*Held*, that the trustees of a settlement of the share of one of the residuary legatees, made on her marriage, ought to be parties; but that the children of the marriage would be sufficiently represented by such trustees.

A BILL to execute the trusts of a will for the sale and distribution of the proceeds of the real estate of the testator amongst his residuary legatees. The trustees and all the residuary legatees were parties to the suit, but one of such legatees had married, and her interest under the will was settled upon her marriage for the benefit of the husband and wife and children of the marriage. The trustees of that settlement were not parties to the suit, nor were the issue of that marriage.

Mr. *Karslake*, for the Plaintiffs, submitted that the trustees of the settlement made on the marriage of the residuary legatee, as well as the children of that marriage, were all cestuis que trustent under the will of the testator, and all sufficiently represented by the trustees of that will, within the 9th Rule of the 42nd section of the statute 15 & 16 Vict. c. 86. If, however, there were any reason to think that the title would be open to objection if the other parties were absent, the Court would allow the bill to be amended by bringing them before the Court.

Mr. *Follett*, for the Defendants.

The VICE-CHANCELLOR said, that, when the Act of Parliament had expressly enacted that trustees should represent the persons beneficially interested in the estate, he had not the slightest idea that any purchaser would be allowed to say, that, because some of the cestuis que trustent were not parties to the suit in which the decree was made, he could object to the title. Under the Act the suit might be instituted by one of the residuary devisees or legatees, and the decree might then have been made, and the other parties might have been served with notice of the decree. This practice had been substituted for the former one, of bringing all the cestuis que trustent before the Court in the first instance—a practice which had its origin probably in the right of the purchaser under the decree to covenants for title from

the parties beneficially interested; but which practice was in truth a source of unnecessary difficulty and expense in the prosecution of suits. The present suit was not, however, framed in the manner authorised by the new Act. The Plaintiff had brought before the Court all the residuary legatees, but not the trustees of the settlement of one of the shares. He was of opinion, that, the suit being framed in this form, the trustees of the settlement should be made parties; but he thought those trustees would sufficiently represent the children of the marriage, and that the latter need not be made parties.

### Parish Registers.

EXTRACTS from parish registers of entries of marriages, baptisms, and burials, purporting to be signed by the incumbents of the respective parishes, received in evidence under the stat. 14 & 15 Vict. c. 99, s. 14, without further verification: *In the Matter of Neddy Hall's Estate*, (App., p. xvi).

### Payment out of Court.

In the Matter of L. A. BATARD—Nov. 24th, 1852.

MR. MARTELLI appeared in support of a petition for the transfer to the petitioner of 171*l.* Consols, the amount of a legacy paid into Court under the Legacy Duty Act (36 Geo. 3, c. 52).

The VICE-CHANCELLOR said, that the application should have been made at Chambers. In all cases of money paid into Court under the Legacy Duty Act, the order for payment to the legatee was a matter of course, upon proof of his having attained twenty-one, and of the identity of the applicant. The order might, however, be made upon the petition in this case, as the rule of the Court, dispensing with such petitions, might not be yet generally known (a).

Application for payment out of Court to legatees of legacies paid in under the Legacy Duty Act (36 Geo. 3, c. 52), to be made to the Judge in Chambers.

The affidavit required under the Exchequer Order of the exclusive title of the petitioner to funds paid

into Court, under Acts of Parliament, for lands &c. taken from incapacitated persons, is not necessary, on applications by tenants for life for the dividends only of such funds: *In the Matter of the Baroness Braye* (App. p. xxii).

(a) See Proceedings before the Judge in Chambers, art. 7, post.

## BIRD v. BIRD—Nov. 24th, 1852.

On an application for the payment to creditors, who had come in under a decree, of small sums of money upon powers of attorney of an old date, the Court required to be satisfied by some late evidence that the creditors who had executed the powers were still living.

MR. *FREELING* applied for an order, that sums of money found due to creditors in this cause, residing in *Newfoundland*, might be paid to their attorney in this country. The application was made upon powers of attorney, executed by the creditors, to receive whatever might be found due to them from this estate, some of which were dated in the year 1845, and others subsequently. He stated that there were in all about thirty powers of attorney; that the sums were chiefly of small amount, the whole amount to be divided being about 500*l.*; and that no further powers could be obtained during the present winter, all communication with the bay of islands being for the season closed by the ice.

The VICE-CHANCELLOR said, that, as to the larger sums of 100*l.* or 200*l.*, it would be better to procure powers of attorney from the office of the Accountant-General in the usual form; and, as to the smaller sums, some evidence must be given to satisfy the Court that the persons who had executed the powers of attorney were still living: without such information the Court would not act on powers of so old a date.

Upon a further application, the Court ordered payment to the solicitor of the petitioners, the creditors, of such of the debts as were under 10*l.*, the solicitor undertaking to pay them over to the petitioners, thereby diminishing the number of petitioners as to whom further evidence or further powers were required.

## WINDSOR v. CROSS—Nov. 15th, 1852.

Amendment of an order for payment of money out of Court for the maintenance of infants, by directing it to be paid to two out of three executors, where one executor had gone out of the jurisdiction after the order was made, and after it had been acted upon by the Accountant-General.

THE widow of the testator in the cause was the guardian of his three infant children, and the widow and two others were executrix and executors of the will. An order for payments out of the fund in Court for the maintenance of the infants had been made, and had been acted on for about two years. The allowance for two of the infants was ordered to be paid to the mother alone; and the allowance for the maintenance of the



other child, who had been apprenticed, was ordered to be paid to the two executors and the executrix jointly. One of the executors having recently gone out of the jurisdiction, application was made for an alteration of the order, by directing the future payments, on account of the apprenticed child, to be made to any two of such executors and executrix, instead of to all three.

The VICE-CHANCELLOR at first expressed a doubt, whether, as the altered circumstances had taken place subsequently to the order, a new order would not be necessary; but, after consulting the Registrar, he directed the order to be amended in the form asked.

Mr. *Whatley* for the petitioners.

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Ex parte the TRUSTEES of SHREWSBURY HOSPITAL—*Dec. 22nd,*  
1852.

MR. AMPHLETT asked that the order might direct the dividends of a fund in Court to be paid to the trustees, (six in number, naming them), and to the survivors and survivor of them, and *the trustees for the time being* of the charity. A previous order had been made in that form; but it did not appear whether the case had arisen under which the Accountant-General had been required to act upon that part of the order which directed him to pay to the "trustees for the time being," owing to such trustees having ceased to be the persons named in the order, or any of them.

Order to pay dividends to A., B., C., &c. (trustees of a charity), and the survivors and survivor of them, and *the trustees for the time being.*

The VICE-CHANCELLOR said, as the order had been made in that form, he would follow it. There was no reason why the Court should refuse to make such an order, if the Accountant-General were willing to act upon it.

## Personal Representative.

CHAFFERS *v* HEADLAM—Nov. 11th, 16th, & 25th, 1852.

A motion upon notice, and an order thereupon, pursuant to the 44th section of the stat. 15 & 16 Vict. c. 86,—that a suit by creditors interested in the property comprised in a trust-deed made for their benefit, might proceed against the trustees without a personal representative of the deceased debtor, the author of the trust, where no such representative existed, and the estate was insolvent.

THE bill was brought by the Plaintiff on behalf of himself and all the creditors of *Thomas Wheldon*, interested under a composition deed, made for the benefit of such creditors against the trustees appointed by the deed, for an account of the estate of the debtor possessed by the trustees. *Thomas Wheldon* died in 1850, having, by his will, made his widow his universal devisee and legatee, and appointed the widow and two other persons his executrix and executors. The widow alone proved the will, and on the 19th of June, 1852, she died. The present bill was filed on the 29th of June, 1852.

Mr. *De Gez* moved *ex parte* for the appointment of some person to represent the estate of *Thomas Wheldon*, for the purposes of the suit. The application was supported by affidavits that searches had been made in the Prerogative Courts of *Canterbury* and *York*, and in the Diocesan Court of *London*, but no grant of probate or letters of administration of the estate of the widow could be found; that the widow was residing at *St. John's Wood, Middlesex*, at the time of her death; that the deponent believed that no will of the widow was proved in, and that no letters of administration of her estate had been granted by, any Court; and that there was no legal personal representative of the widow in existence. The deponent also stated, that he believed certain persons therein named were the next of kin of the widow; and he stated applications which had been made to them, and their replies, to the effect, that they had nothing to do with her affairs; and also that one of the parties so applied to had referred the Plaintiff to the solicitor of the Defendants, the trustees, as the person who would probably be acquainted with any will left by the deceased; and that such solicitor had not replied to applications which had been made to him on the subject. The deponent stated that the estate of *Thomas Wheldon* would be insufficient for the payment to the creditors interested under the deed of the amount of their respective debts, and that there would be no surplus coming to his estate; that the expense of obtaining letters of administration *de bonis non* of the estate of *Thomas Wheldon* would, exclusive of the stamps, amount to about 25*l*.

VICE-CHANCELLOR:—I think the case is one of those for which the statute 15 & 16 Vict. c. 86, s. 44, was intended to provide; but notice of the application should be given to the Defendants.

Mr. *De Gex* moved, upon notice, for an order that the suit might proceed in the absence of the personal representative of *Thomas Wheldon*.

Mr. *Elderton*, for the Defendants, the trustees, agreed that the case was one contemplated by the Order; but said that it was in the nature of an indulgence to the Plaintiff, and asked for the costs.

VICE-CHANCELLOR:—The costs of the motion will be costs in the cause.

SWALLOW v. BINNS—Nov. 25th, 1852.

MR. *WICKENS* moved for leave to set down a special case, under the 13th section of the Act 13 & 14 Vict. c. 35, where in-  
Case in which  
the executors  
of a father,  
who survived  
 and became the sole next of kin of his deceased children, may be appointed by the Court, under the 44th section of the 15 & 16 Vict. c. 86, to represent the estates of the deceased children for the purposes of the suit.

A mortgagee, having filed his claim against the heirs in gavelkind of the deceased mortgagor, who had died intestate, prayed a sale of the mortgaged premises, and the application of the proceeds, so far as it would extend in payment of his debt, and the administration of the personal estate and the other real estate of the debtor, for the benefit of the Plaintiff and the other unsatisfied creditors, but there was no personal representative of the deceased mortgagor, except an administrator ad litem:—the Court held, that the suit could not proceed, under the 44th section of the stat. 15 & 16 Vict. c. 86, in the absence of a personal representative of the intestate, where the object was to administer his estate; and that a testator or intestate, whose estate was to be administered, was not intended to be included in the words of the Act,—“any deceased person who was interested in the matters in question;” and that neither was the administrator ad litem a sufficient representative, where the object was not merely to bind, but to administer the estate: *Groves v. Levi*, Nov. 13, 1852, (16 Jur. 1061).

On a petition by the heir-at-law of one who was entitled, upon the death of the tenant for life, to lands which had been taken under the Manchester Improvement Act, for payment out of Court of the purchase-money of such lands, the executors named in the will of the deceased party, but who had not proved the will, were, under the 44th section of the 15 & 16 Vict. c. 86, appointed to represent his personal estate for the purposes of the proceeding: *Ex parte Cramer*, Vice-Chancellor Stuart, Nov. 6, 1852, (L. T.).

After an order on a claim for administration by residuary legatees, *R. J.*, a Defendant, one of the executors, and who was also a residuary legatee, and who had not taken out probate, or possessed assets of the testator, died. Upon affidavit that the deceased had left a widow and several children; that the widow had said her husband left nothing, and she would not administer; and, upon affidavit also, that it would cost the Plaintiffs 30*l.* to procure administration to the estate of the deceased:—The Court ordered, that the suit might proceed without making the personal representative of *R. J.* a party thereto; and directed the inquiries and accounts directed by the order of the 21st April, 1852, to be prosecuted and taken in like manner as if a legal personal representative of the late Defendant *R. J.* had been served with a writ of summons, and had entered his appearance with the Clerk of Records and Writs as a Defendant: *Rogers v. Jones*, Nov. 3rd & 5th, 1852, (16 Jur. 968).

fants were parties. *Nathaniel Binns* made a settlement in September, 1821, whereby he took a life interest in himself, and created trusts in remainder for the benefit of children, but which trusts were inconsistent; it being impossible to ascertain, on the expressions, whether the objects were children living at the death of the tenant for life, or all children who might attain the age of twenty-one or marry. Some of the children had attained twenty-one, and died before the tenant for life. Of these children there were no representatives. The executors of the father and the surviving children were parties.

*Mr. Selwyn*, who appeared for Defendants, suggested, that under the 51st section of the Act 15 & 16 Vict. c. 86, the Court might determine the question in the presence of some of the parties interested, "without making the other parties interested in the property respecting which the question may have arisen, or interested under the same settlement, will, or other instrument, parties to the suit."

VICE-CHANCELLOR:—That is in cases where you have some of the parties interested in the question in every point of view. In this case the question is between the surviving children and the representatives of deceased children; but you have no party representing the interests of the deceased children. If you produce satisfactory evidence that the father survived the deceased children (in which case he would be their next of kin), and also that the children died intestate, the Court may then, under the 44th section of the Act 15 & 16 Vict. c. 86, appoint the executors of the father to represent the deceased children for the purposes of this case.

### Proceedings before the Judge in Chambers.

VICE-CHANCELLOR TURNER'S CHAMBERS.—Nov. 10th, 1852.

Order, under the stat. 15 & 16 Vict. c. 80, s. 29, as to the matters and things to be heard in Chambers.

THE following applications are to be made at Chambers, viz:—

1. As to guardianship of infants (except the appointment of guardians ad litem).
2. For the appointment of a special guardian to concur in a special case.
3. As to the maintenance or advancement of infants.
4. Under the Drainage Act.

5. Under the Trustee Acts of 1850 and 1852.
6. For the administration of estates under the Act of 15 & 16 Vict. c. 86.
7. Under the Legacy Duty Act for payment of money out of Court.
8. For time to plead, answer, or demur.
9. For leave to amend bills or claims.
10. For enlarging publication or the time for closing evidence.
11. For the production of documents.
12. Relating to the conduct of suits or motions.
13. As to the matters connected with the management of property.
14. For payment into Court of purchase-moneys under sales, by order of the Court, and investing same.

### Production of Documents.

THOMPSON v. TEUTON—Nov. 11th, 1852.

SIR W. P. WOOD moved for the production of documents admitted by the answer of the Defendant to be in his possession.

Application for the production of documents to be made to the Judge in Chambers.

The VICE-CHANCELLOR, in this case, observed that the Judges of the Court had resolved to hear at Chambers applications for the production of documents; and, if any difficulty arose with regard to the documents to be produced, the consideration of the case would be adjourned for discussion in Court (a).

No affidavit is necessary to support an application for production on oath of documents.

ments under the 15 & 16 Vict. c. 86, s. 20, whether that application be made by the Plaintiff or the Defendant: *Rockdale Canal Company v. King* (15 Beav. 11).

A Plaintiff before answer, or a Defendant, is entitled to an order for the production of documents in the possession of his adversary; and delay in making the application does not deprive him of the right: *Rockdale Canal Company v. King* (15 Beav. 11); *S. P., McIntosh v. The Great Western Railway Company*, before Vice-Chancellor Stuart, 11 Nov. 1852. And on the point of delay, see *Duke of Beaufort v. Taylor* (2 Hare, 245).

The Court has settled an order, with reference to the Act 15 & 16 Vict. c. 86, s. 20, requiring the party against whom the application is made to make an affidavit as to the documents in his possession or power, and to produce such of them as he does not state an objection to produce. And the Court has also settled a form of affidavit (see Beav. Ord. Can.), on the model of a carefully prepared answer, which, though not obligatory, will be considered satisfactory: *Rockdale Canal Company v. King* (15 Beav. 11).

On the right of a Defendant, in the character of an agent of the Plaintiff or otherwise, to inspect documents produced by another Defendant, under the usual order: *Bartley v. Bartley*, Vice-Chancellor Kindersley, 20 & 23 Nov. 1852, (L. E.)

(a) See Proceedings in the Judges' Chambers, art. 11.

## Purchase-Money.

DAVENPORT v. DAVENPORT—Nov. 2nd, 1852.

Orders to pay into Court purchase-money of property sold under the decree of the Court, where there is no question as to the title, made in Chambers.

MR. W. M. JAMES moved, on behalf of purchasers, to pay their purchase-money into Court.

The VICE-CHANCELLOR said, the order might, in cases where the purchasers accepted the title, be obtained at Chambers(a).

(a) See Proceedings in Judges' Chambers, art. 14.

## Purchases for Re-investment.

APPROVAL by the Court of purchases for the re-investment of monies in land &c. and reference of the title to the property so purchased to the Conveyancing Counsel: *In the Matter of Cuddick's Settlement*, (App., p. ix.).

## Receiver.

WHERE the application for the appointment of a receiver is made for the first time in the cause, it must be heard in Court; but where the application is only to supply the place of a receiver already appointed, and whose office has become vacant by death or otherwise, it may be made in Chambers: *Grote v. Bing*, V. C. Stuart, Dec. 9th, 1852, (L. T.).

## Reference to Accountants or Persons of Science.

MORRELL v. TINKLER—Dec. 3rd, 1852.

Where, in a suit referred to the Master, it is desired to

THE Plaintiff was the surviving partner, and the executor and trustee, of the testator. The bill was filed to have the partnership

obtain the advantage of the new powers conferred upon the Court by the recent statutes, the proper course is to apply for the transfer of the proceedings to the Judge in Chambers. The statutes do not give the Court power to authorise the Master to avail himself of their provisions.

An architect and builder, having claimed to be a creditor of the testator in an administration suit, for a large amount, in respect of rebuilding a mansion-house, and the Master having made a separate report of the claim, the Court gave the creditor leave to bring an action. After the New Procedure Act came into operation, the creditor applied for a reference back to the Master, giving him power to call in the assistance of a builder and surveyor, under the 42nd section of the stat. 15 & 16 Vict. c. 80. The Court held, that it was not intended that the Court should delegate to the Master the new powers given by the Act; but that the proper course to take advantage of such powers was to discharge the order, giving liberty to bring the action, and to transfer the inquiry to the Judge in Chambers, who might then avail himself of the assistance of builders, surveyors, or other scientific persons: *Mildmay v. Methuen*, November 4 & 8, 1852, (16 Jur. 965).

accounts taken; and a decree had been made in the cause directing the usual reference to the Master, to take the accounts. The partnership had been in the business of bankers, and extended over a period of thirty-one years.

Mr. *Roll* and Mr. *Beavan* appeared in support of the petition of the Plaintiff, that the accounts and inquiries which had been ordered to be taken and made by the Master, might, in lieu thereof, be ordered to be prosecuted and made before the Judge in Chambers. The parties were desirous of availing themselves of the proceeding authorised by the statute, 15 & 16 Vict. c. 80, sect. 42, by which the Court might obtain the assistance of an accountant, and this appeared to be the right course of proceeding for that purpose.—They cited *Mildmay v. Methuen*, before Vice-Chancellor *Kindersley*, 8th Nov. 1852.

The VICE-CHANCELLOR made the order as asked, observing, that he had no power to authorise the Master to employ an accountant; but that, by having the prosecution of the decree transferred according to the prayer of the petition, the matter would be brought before a jurisdiction able to avail itself of the new powers conferred upon the Court by the statute. It had been held that the Act did not give the Master such jurisdiction.

## Revivor and Supplement.

TATE v. LEITHEAD—Nov. 3rd, 1852.

A CREDITOR'S suit, seeking payment out of realty as well as out of personalty. The Defendants were two executors (one of them out of the jurisdiction), and the cestuis que trust of the devised estate. The usual administration decree was made. The Master committed the prosecution of the decree to two other creditors, who had proved before him a joint debt. The executor within the jurisdiction possessed assets of the testator, and died, leaving two executors, who proved his (the executor's) will. One of the two creditors having the conduct of the cause took out administration de bonis non to the original testator.

One of two creditors, Plaintiffs in a creditor's suit, upon an abatement by the death of an executor of the testator, obtained administration de bonis non to the estate of the testator, and leave was given to the other creditor to file a

supplemental claim against him and the executors of the deceased executor, the case not being within the 52nd sect. of the 15 & 16 Vict. c. 86, which gives to an order on motion the effect of a supplemental decree.

Mr. *Harrison*, for the other creditor (a), asked leave to file a special claim to bring the administrator de bonis non and the executors of the deceased executor before the Court, praying that the latter might admit assets of their testator to answer what he had received, or that they might account in the usual manner.

The VICE-CHANCELLOR said, that this relief was more than that which was given under the usual supplemental decree, and therefore it was not affected by the 52nd section of 15 & 16 Vict. c. 86. Leave given.

(a) See *Griffith v. Vanhegghuysem*, (ante, p. 85).

#### MARTIN v. HADLOW—Nov. 3rd, 1852.

Order on motion ex parte by the Plaintiff to revive and carry on proceedings in an administration suit, upon abatement by the death of the executor, under the 52nd section of the Act, 15 & 16 Vict. c. 86, upon allegation (without proof) of the facts constituting the abatement.

ORDER had been made for administration on a claim. An abatement occurred by the death of the executor, before the New Procedure Act came into operation.

Mr. *Forster* moved, on behalf of the Plaintiff, under the 52nd sect. of 15 & 16 Vict. c. 86, for an order to the effect of the usual order to revive, or of the usual supplemental decree.

The VICE-CHANCELLOR made the order to revive, *and* carry on the proceedings, as on a supplemental decree. The order for the revival of the suit alone would not be sufficient. The order to proceed was also necessary (a).

The order was made on the *allegation* of the facts constituting the abatement, without *proof* of those facts.

Where the case is one in which the order to revive only is necessary, and not an order to the effect of a supplemental decree, the motion is of course, and does not require to be mentioned to the Court: *Bonfil v. Purchas*, Nov. 6th, 1852, (16 Jur. 965); *England v. Ventham*, M. R., Dec. 1st, 1852, (Ex relatione).

An order, to the effect of a supplemental decree, made under the 52nd section of the 15 & 16 Vict. c. 86, where the interest of an infant Plaintiff had been transmitted to the trustees of a settlement made under the direction of the Court in consequence of her marriage: *Atkinson v. Parker*, Nov. 29th, 1852, (16 Jur. 1005).

Order to the effect of a supplemental decree, on the birth of a child interested in the subject of the suit: *Fullerton v. Martin*, V. C. *Kinderley*, Nov. 25th, 1852, (L. E.).

A creditor, who had proved his debt in the cause, applied and obtained an order under the 52nd section of the Act 15 & 16 Vict. c. 86, for the order to revive and carry on the proceedings, the suit having abated by the death of the Plaintiff, the Court being of opinion that the benefit of the clause was not confined to the parties to the suit: *Loves v. Loves*, Nov. 15th, 1852, (16 Jur. 692).

(a) *Cox v. Taylor*, Vice-Chan. *Kinderley*, Nov. 3rd, 1852. Like circumstances in a case where the suit was by bill: like order. Mr. *Elderton*, for the Plaintiff.



## Sale in Foreclosure Suits.

BOYDELL v. MANBY—Nov. 12th, 1852.

A CLAIM for foreclosure.

Mr. *Southgate* for the Plaintiff.

Mr. *Begbie* for the mortgagor, asked for a sale, under the 48th section of the Act, 15 & 16 Vict. c. 86.

Mr. *Southgate* suggested that the Defendant should, in that case, deposit 100*l.* to answer the expense.

This being declined, the order for foreclosure was made, and by consent, the Plaintiff foregoing the costs and the Defendant the account, in the following form:—

The Defendant admitting that £— is due for principal, and £— for interest, order that he pay such principal and interest, together with the subsequent interest, at the end of six months from this date; and upon such payment let the Plaintiff reconvey the premises; and in default of such payment, let the Defendant be foreclosed absolutely without further order.

incumbrancers subsequent to the Plaintiff. The decree directed the accounts of what was due to the several incumbrancers, and directed the proceeds of the different property to be distinguished: *Cator v. Reeves*, Nov. 12, 1852, (16 Jur. 1004).

An order for sale, made on a claim for foreclosure, at the request of the mortgagee, such sale to be "one month after the Judge's Clerk shall have made his certificate of the amount of the principal, interest, and costs due to the mortgagee, if such amount shall not be paid:" *Staines v. Rudlin*, Nov. 6, 1852, (16 Jur. 965).

Application by the mortgagor for sale instead of foreclosure.

Form of order for foreclosure taken by consent without account.

A sale of mortgaged property, consisting of freehold and leasehold premises, and a policy of life insurance, ordered in a foreclosure suit, at the request of the mortgagee. The mortgagors were bankrupt, and the suit was against their assignees, and against in-

GIRDLESTONE v. LAVENDER—Nov. 25th, 1852.

MR. *DRUCE* moved, under the 48th section of the statute 15 & 16 Vict. c. 86, on behalf of the Plaintiff, the mortgagee, that the mortgaged premises might be forthwith sold; the motion also asked that, if necessary, the cause, which had been heard before the present Term, and upon which a decree of foreclosure had been made, might be reheard. He submitted that the provision in the 48th section applied to suits which had been commenced before the Act, as well as subsequent suits. The Master had found 395*l.* due to the Plaintiff on the mortgage, and it ap-

The Court refused, on the application of the mortgagee, after a decree of foreclosure had been made, to vary the decree by directing a sale, under the 48th section of the 15 & 16 Vict. c. 86.

peared by affidavit that the property comprised in the security was not worth more than 200*l*. The mortgagor had not appeared in the cause.

The VICE-CHANCELLOR said, that he could not, on this motion, make an order which would supersede the decree. If the Plaintiff wished to have a rehearing of the cause, he might obtain that without a motion for leave to do so. The 48th section did not extend to a case where a decree for foreclosure had been already made. If the mortgagee might apply in such a case, the mortgagor must have the same right, and the consequence would be that a mortgagor might, after a decree for foreclosure, apply to the Court for a sale. The provision that the sale was to be directed "on such terms as the Court may think fit to direct, and, if the Court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem," clearly contemplated an order to be made at the time of and not after the decree.

### Scheme, Settling, for Administration of a Charity.

In the Matter of HANSON'S TRUST—Dec. 22nd, 1852.

Petition for the administration of a charity under Sir Samuel Romilly's Act, heard in Court; and, upon the necessary proof constituting the foundation for the order being given, directed to stand over, and the petitioners to attend the Judge in Chambers with proposals for a scheme; and the Attorney-General to be served with the summons for attendance in Chambers.

ANN HANSON, by her will, dated in 1826, gave to trustees 200*l*., to be settled and secured upon them and their successors, in such manner as they should be advised was best for effecting the objects she had in view; and she directed that they and their successors should ever thereafter distribute the interest of 200*l*. annually in money on St. John's day in December, at Paddock, in the hamlet of Marsh, in the parish of Huddersfield, unto and amongst such old men and women as shall have resided three years within the hamlet of Marsh, and who have attained sixty years of age and upwards, and do not receive parochial relief, as should appear to the trustees and their successors to be proper objects of the charity; and she gave the residue of her personal estate to the same trustees upon trust, to put out the same upon good freehold, copyhold, leasehold, or other substantial security, not personal or in the funds, and to apply the interest from time to time for ever in such way as they or their successors should, in their discretion, from time to time think right and proper in

promoting the comfort, improvement, and innocent recreation of the poorer classes of the inhabitants of *Huddersfield*, in any way which they or their successors might from time to time devise.

Mr. *G. L. Russell* appeared for the petition of the surviving trustee of the will, the vicar of *Huddersfield* and the incumbent of *All Saints, Paddock*, presented under Sir *Samuel Romilly's* Act (a) for the direction of the Court in the administration of the charity.

The VICE-CHANCELLOR:—Produce the evidence of the death of the other trustees, and let the petition stand over, and the petitioners attend me in Chambers with proposals for a scheme. Let the Attorney-General be served with the summons for attendance on settling the scheme.

(a) 52 Geo. 3, c. 101.

### Service of the Decree or Order.

CASES in which the directions of the Court will be given in Chambers, on the question of what parties are to be served with the order or decree, and as to which of the parties service may be dispensed with: *De Balinhard v. Bullock*, (App. p. xiii.).

### Special Case.

*DONVILLE v. LAMB*—Dec. 21st, 1852.

THE special case was framed to obtain the opinion of the Court on the title of the parties to the bonuses on certain policies of insurance; and it stated, among other things, a memorandum and a deed-poll. The date of the memorandum was not inserted, and it was material to consider the effect of that document, as declaring or indicating the trusts upon which the bonuses should be held. The special case contained the following averment:—"It is believed that the signature of the before-stated memorandum and the execution of the deed-poll were contemporaneous acts, and that the policies respectively were left in the hands of the said *J. B.*, one of the said trustees, and who then acted as solicitor both for the said *J. O.* and the said trustees."

Statements on special cases with reference to facts which are doubtful, or as to which the evidence is scanty or insufficient.

The VICE-CHANCELLOR said, that he could not, upon a special case, act upon inferences drawn by the parties. If the matter were before the Court on a bill, he might direct inquiries to ascertain facts, of which the Court was not satisfied at the hearing. He could not direct an inquiry upon a special case; and when the question was brought forward in that form, the special case must, with reference to any material point upon which the evidence was doubtful, state all the facts upon the subject which can be ascertained, and state, and verify (if necessary) by affidavit, that no further evidence can be given on the subject; and upon that allegation and proof, it must be left to the Court to judge of the result of the statement.

The case stood over to be amended.

Mr. *Follett*, Mr. *Craig*, Mr. *Osborne*, and Mr. *Whitbread*, of counsel.

## Special Circumstances.

WILLIAMSON v. JEFFREYS—Nov. 10th, 1852.

MR. J. BAILY, for the Plaintiff.

No direction in a decree for liberty to state special circumstances is henceforth necessary.

Special directions as to the manner of taking accounts,

and as to the reception of books of account as *prima facie* evidence, not given at the hearing, but such questions determined by the Judge in Chambers: *Attorney-General v. Attwood*, Vice-Chancellor *Stuart*, Dec. 2, 1852, (L. E.)

The VICE-CHANCELLOR said, that it was no longer necessary, in a decree or order, to make any direction with a view to the consideration of special circumstances, as in future the case would be before the Judge, who, in dealing with it at Chambers, could enter into the consideration of any special circumstances which he might deem material.

## Stamp.

LAMBERT v. LOMAS—Nov. 19th & 20th, 1852.

A WRITTEN copy of an injunction bill was filed under the 6th section of the Act, 15 & 16 Vict. c. 86, which was duly stamped with the 1*l*. stamp (a); and the Plaintiff, pursuant to the same section, within the fourteen days, proceeded to file the printed copy. The Clerk of Records and Writs considered himself bound by the effect of the 6th General Order of the 25th of October, 1852, and of the 12th section of the Suitor's Relief Act (15 & 16 Vict. c. 87), to require that another stamp of 1*l*. should be affixed to the printed copy.

One stamp is sufficient for the written and printed copies of the same bill, the written copy remaining on the file, and the printed copy being filed within the fourteen days.

Mr. *Amphlett* moved that the printed copy might be filed, without any further stamp.

The VICE-CHANCELLOR said, the legislature could not have intended that the suitor should, in such case, be subjected to the expense of two stamps; these were not two bills, but two copies of the same bill. The printed copy must be filed without a further stamp.

(a) See the Second Part of the Schedule to the 6th General Order of the 25th of August, 1852.

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JONES v. BATTEN—Dec. 7th, 1852.

MR. *FREELING* applied for an order, that the Record and Writ Clerk should file a printed copy of the bill, without a stamp, where the written copy had been filed and duly stamped within the fourteen days, under the 6th section of 15 & 16 Vict. c. 86.

The VICE-CHANCELLOR said, that, since the order in *Lambert v. Lomas* (supra), some difference of opinion had been expressed; and he desired that the application should be made to the Lords Justices.

Application having been made accordingly, their Lordships held, that the stamp affixed to the written copy sufficed for the two copies of the bill, the former remaining (as they considered it should) on the file, and the latter being filed within the fourteen days.

## Title.

KEYSE v. HEYDON—Dec. 2nd, 1852.

Manner of proceeding in a suit for specific performance of a contract, where the contract, the sufficiency of the abstract delivered, and the title of the vendor, are all disputed.

A BILL by the vendor against the purchaser, for the specific performance of an agreement for the purchase of a leasehold estate. The Defendant contended, first, that he was induced to enter into the contract by misrepresentation and deception on the part of the vendor and his agent; and secondly, that, if he were bound by the contract, the vendor had shewn no title.

Mr. Rolt and Mr. Wright, for the Plaintiff; and Mr. Russell and Mr. Selwyn, for the Defendant.

The VICE-CHANCELLOR held, that the Defendant was bound by the contract, and that the Plaintiff was entitled to the specific performance; and directed that a note should be taken by the Registrar of the decision of the Court upon that point; and that the cause should stand over, and be in the paper again to be spoken to on the question of title. And he inquired of the Defendant's counsel, whether they would be satisfied to rely on the objections to the title which had been already delivered, or whether they desired the opportunity of going generally into the title.

Mr. Russell said, that the Defendant desired to go into the title generally, and moreover, he had never obtained a sufficient abstract.

Mr. Wright.—We say we are not bound by the contract to deliver any further abstract.

VICE-CHANCELLOR:—If the parties are prepared to go into that question, it may now be determined; if not, it may stand over. The Defendant may now take a reasonable time to bring in other objections; and if I decide that the Defendant is entitled to a further abstract, the case must of course stand over again, if he requires it, in order that he may take any objections which arise upon the additional abstract.

## Title of Account.

In the Matter of *TILLSTONE'S TRUST*—*Nov. 12th, 1852.*

A TRUST fund was bequeathed, as to one-fifth for the children of *John*, as to another fifth for the children of *Deborah*, and as to another fifth for the children of *Benjamin*. The trustees paid the three-fifths into Court in one account.

A fund bequeathed in aliquot parts, on distinct trusts, ought not to be paid in by the trustees to the joint account of the several trusts, but ought to be carried to separate accounts.

*Mr. J. T. Wood* appeared for the petitioner, the only child of *Benjamin*, now applying for one third of the fund.

The VICE-CHANCELLOR said, that the investment had been improperly made on the joint account, instead of carrying the several legacies to separate accounts, as in a case of distinct trusts it ought to have been. The effect was, that the parties interested in the two other trusts must be served,—for this reason, that, if the payment of this portion of the fund should be made to the wrong party, the person entitled to it might claim against the remainder of the aggregate fund belonging to the two other trusts.

*Mr. J. T. Wood* suggested that the difficulty might be obviated on this petition, and removed as to the rest of the fund, by amending the petition, making it the petition of all the three parties interested in the joint fund; and asking that, by the same order, the other two trust funds might be carried to separate accounts.

VICE-CHANCELLOR:—That will be very desirable, if it can be done.

The petition was afterwards amended, and one-fifth of the fund paid out to the petitioner, and the other two-fifths carried over to the separate accounts of the other children.





# APPENDIX.

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No. II.

## Cases on Chancery Procedure

DECIDED BY

SIR WILLIAM PAGE WOOD, KNT.,  
VICE-CHANCELLOR,

IN

HILARY TERM, 16 VICT. AND THE FOLLOWING SITTINGS.

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### Amendment.

THE Defendant, although he has the conduct of the cause, is not therefore enabled, under the 53rd section of the stat. 15 & 16 Vict. c. 86, and the 44th General Order of the 7th of August, 1852, to file a statement of facts or circumstances occurring after the institution of the suit, to be annexed to the bill: *Lee v. Lee*, *Lys v. Lee*, (App. p. xci).

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### Answer.

COUSINS v. VASEY—*Jan. 21st & 24th, 1853.*

MR. PRENDERGAST, for the Plaintiffs, on a motion for decree.

MR. SMYTHS for a Defendant in the same interest.

MR. ROLT and MR. BUSK, for the Defendant *Collingwood*, objected to *Collingwood's* answer being read against himself (*Collingwood*) as an affidavit, inasmuch as no notice had been given to the Defendant *Collingwood* of the intention to read it. The

On a motion for a decree, the answer of a Defendant may be read against himself, without notice having been given, under the 23rd General Order of the 7th of August, 1852, of the intention to read the same

as an affidavit against such Defendant; but the answer of one Defendant cannot be read against another Defendant, without notice being given to such other Defendant of the intention to read it.

A deed mentioned in the answer of a Defendant is admissible in evidence on a motion for decree against such Defendant, without notice of his intention to use it—*Semble*.

23rd Order of the 7th of August, 1852, required that the list of affidavits to be used in support of the motion should be set forth at the foot of the notice; and after the two following Orders, pointing out what course was to be taken with the affidavits in answer and in reply, came the 26th Order, which provided, that no further evidence on either side was to be used on the motion, without leave of the Court.

Jan. 24th.

The VICE-CHANCELLOR was of opinion, that the answer of *Collingwood* might be read against him, without notice. The answer was a part of the record in the cause, and was of course known to the Defendant by whom it had been put in. It was not a matter, therefore, upon which he could be taken by surprise. The object of the Orders was, that the parties should have notice of all the affidavits which were filed, and that the affidavits should be filed within a limited time. The cause was then to be in the same position as if the bill had been filed, the answer put in, and publication had passed. The answer was to be dealt with as it would have been under the old practice, except that it was made a part of the evidence in the cause, and to be treated as an affidavit. The notice was necessary as to the affidavits, for the affidavits were now analogous to depositions, of the taking of which the opposite party must have notice; but this did not apply to the answer of the Defendant.

Mr. *Busk* objected to the reception of the answer of one of the other Defendants as evidence against *Collingwood*; and he also objected to the admission of a deed (more than thirty years old), mentioned in the answer, not included in the notice of evidence to be used.

The VICE-CHANCELLOR reserved the points for consideration with the other Judges.

The VICE-CHANCELLOR said, that the other Judges of the Court agreed with him as to the point which he had decided with regard to the admission of the answer of the Defendant against himself, on the decretal motion, without notice. The answer in fact did not come within the description of affidavits referred to in the 23rd Order. The other and a different question was, whether the answer of one Defendant could be read against a co-

Defendant. The inconvenience which would be the result of admitting the answers of every Defendant to be read against the others, would be, that every Defendant would be under the necessity of taking copies of the answers of all the other Defendants, whether he received notice or not. The opinion of the Judges, and in which he concurred, was, that the answers of the Defendants ought not to be admitted as against other Defendants, without special notice having been given of the intention to use them to the parties against whom they were proposed to be read. As against other Defendants, to whom such notice was not given, the inconvenience of making the answer generally receivable would be so great, that the best construction of the Act and the Orders was, that they ought not to be received.

With respect to the deed, the Judges were rather of opinion, that it might be received without notice, subject to any inquiry or other question which might arise, in case it should appear to be a surprise on any of the parties. But there was another difficulty, on which his Honour thought it must be excluded, namely, that it did not appear to have come from the proper custody.

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ATTORNEY-GENERAL v. HUDSON—Feb. 21st & 22nd, 1853.

MR. SELWYN applied for a direction that the Clerk of Records and Writs might be ordered to file the answer of the Dean of *Norwich* and several other trustees of a charity, Defendants to the information.

The Defendants had joined in answering, and the answer had been sworn by some of the Defendants in the country, and by the Dean of *Norwich* at the Record Office. An error had occurred in the jurat of one of the other Defendants, and the answer was taken out of the Record Office, to be resworn in the country, in order that the inaccuracy might be corrected. On the answer being taken from the Record Office, the clerk in that office cancelled the jurat as to the Dean of *Norwich*, by drawing two lines across it. The inaccurate jurat had been corrected, and the answer was now returned to be filed. The Clerk of Records and Writs required that it should be resworn by the Dean of *Norwich*. It was now submitted, that it was not necessary to reswear the answer; the striking through of the jurat, was the act of the officer of the Court, and it ought not to have been done. It did

The 21st sect. of the stat. 15 & 16 Vict. c. 86, does not involve any alteration of the form of the oath to be administered to a Defendant on putting in his answer.

Reswearing the answer of a Defendant which had been taken out of the Record Office, and of which the jurat had been cancelled by the officer of the Court.

not, however, affect the answer; and the Court would receive it, notwithstanding the lines which had in this manner been drawn across the parchment where the jurat was written. If, however, the answer must be resworn, it was submitted, that it ought to be sworn according to the old form, namely, "You swear that what is contained in this your answer, as far as concerns your own act and deed, is true to your own knowledge; and that what relates to the act and deed of any other person or persons, you believe to be true." Since the stat. 15 & 16 Vict. c. 86, the 21st section of which enacted, that the practice of the Court of issuing commissions to take answers, &c., within the jurisdiction, should be abolished; and that any such answer, &c., may be filed without any further or other formality than is required in the swearing and filing of an affidavit,—the officers had required that answers should be sworn as affidavits, whereby the deposition was taken to the truth of the answer generally.

The VICE-CHANCELLOR inquired, whether it was usual to permit the answer to leave the Record Office after it had been sworn.

Mr. Selwyn.—Answers are now treated as affidavits.

The VICE-CHANCELLOR, having inquired of the Clerk of the Record Office the reason for the cancellation of the jurat, was informed that it was done in consequence of the answer being required to be taken out of the Office: and his Honour held that it ought to be resworn.

On the form of the oath, the VICE-CHANCELLOR said, he had communicated with two of the other Judges, and they were all clearly of opinion, that the Act did not prescribe any alteration in the form of the oath of a Defendant to be used on swearing an answer, and that it ought to be sworn according to the ancient form.

### Bill.

PAYMENT of the 1*l*. stamp on filing bills, by affixing stamps amounting together to that sum: *Brain v. Brain*, (App. p. xc).

Numerical statements in bills may be printed in figures, and not in words at length—*Semle: Anonymous*, (App. p. lxxxiii).

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### Bill of Discovery.

FITZGERALD v. BULT—*Jan. 21st*, 1853.

A BILL of discovery filed by a Defendant in an action at law in aid of his defence.

Proceedings on a motion for an injunction to restrain an action at law before the appearance of the Defendant to a bill of discovery.

Mr. *Prior* moved for an injunction to restrain the Defendants in equity (the Plaintiffs at law) from prosecuting the action brought by them against the Plaintiff in equity in the bill mentioned. The motion was made on affidavits verifying the statements in the bill. The Defendants acted as the bankers of the Plaintiff, and the bill alleged that they had received monies on his account, for which they had not given credit in the particulars of demand delivered in the action; and it prayed a discovery of the entries in the Defendants' books of the transactions between them and the Plaintiff. The Plaintiff did not wish to stay the Defendants' action, if they would undertake to produce the books, or furnish a copy of their account, for the use of the Plaintiff, a sufficient time prior to the trial of the action.

Mr. *Cairns*, for the Defendants, observed, that, in the first place, the motion was irregular, as it was given without leave of the Court before appearance.

Mr. *Prior* said, that had been a mistake on the part of the Plaintiff; but the irregularity had been waived by the Defendants having filed affidavits in answer to the motion.

The objection was not persisted in.

Mr. *Cairns* then opposed the application: first, on the ground that it was made on the eve of the trial, after long and unexplained delay since the action had been brought. (See cases

cited *Holms v. Brown*, Ante, App. I. p. xxix). Secondly, the Defendants were in no default for not answering; for the interrogatories they were to answer were not yet delivered.—[*Mr. Prior*.—They cannot be, owing to your not having appeared (a).] Our time for appearance has not expired. Thirdly, in the absence of default, special circumstances should be shewn entitling the Plaintiff to discovery; but the existence of special circumstances in this case was wholly rebutted by the affidavit of the Defendants. It appeared that there was a pass-book in which the account between the Plaintiff and the Defendants had been entered, to the month of September; but since that time the Plaintiff, although requested to do so, had refused to send in his pass-book to be filled up. He had only to do that, and the Defendants would undertake to return it to the Plaintiff in a few hours, and it would afford him all the discovery which he required. What would be thought by any banker of a customer, who, instead of sending in his pass-book in the usual way, called upon the banker for a discovery of the contents of his books?

VICE-CHANCELLOR.—If you are bound to answer the bill, which is not denied, you will be required to give this discovery. If that be so, what reasonable objection can there be to give the Plaintiff at once a transcript of your account. It may be of some use to him before the trial of the action, but it may not be afterwards. The Plaintiff must, of course, pay your costs.

Mr. Cairns, for the Defendants, consented to give the Plaintiff a transcript of his account in the Defendants' books in the course of the following day.

It was then suggested, that an answer might not be necessary; and that, supposing the interrogatories should not be filed—the Plaintiff getting all he wanted by means of the motion—the Defendants might not be in a position, as under the old practice, to obtain an order for their costs as a matter of course.

Mr. Prior.—It cannot be supposed, that, in the case of a party

(a) Appearance is to be within eight days, (Gen. Ord. 16, of 8th May, 1845). Interrogatories to be filed within eight days after time limited for the appearance of the Defendant, (Gen. Ord. 16th, 7th of August, 1852).

filing a bill of discovery, and not filing interrogatories, the practice of the Court can fail of giving the Defendant his costs.

The costs of the Defendants of the motion were made costs in the cause.

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### Claim.

CHARLTON v. ALLEN—*Jan. 14th, 1853.*

A CLAIM.—The case being called on the Plaintiff did not appear.

Dismissal of claim, the Plaintiff not appearing, without affidavit of service.

Mr. *G. W. Collins* appeared for the Defendant, and asked that the claim might be dismissed. He had not an affidavit of service of the writ of summons; but he submitted that it was not necessary.

The VICE-CHANCELLOR, on inquiring of the Registrar as to the practice, said, the affidavit of service was not necessary, and the Defendant was entitled to have the claim dismissed.

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### Creditor's Suit.

ORDER, in the nature of a supplemental decree, for a creditor who had proved his debt to carry on a creditor's suit, where the original Plaintiff had been bankrupt: *English v. Hayman*, (App. p. lxxxviii).

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### Decree.

THE Plaintiff may, since the statute 14 & 15 Vict. c. 99, examine as a witness a Defendant in a suit in equity, without prejudicing his right to a decree in the same suit against such Defendant: *Harford v. Rees*, (App. p. lxx).

**Deed.****BLAXLAND v. BLAXLAND**—*Feb. 23rd, 1853.*

The deeds which are settled by the Conveyancing Counsel of the Court, are those which are made for the reinvestment of the monies of incapacitated persons, &c. Deeds for conveyance or transfer of trust property from old to new trustees, &c., are approved by the Judge of the branch of the Court to which the cause is attached.

A SUIT for the appointment of new trustees, on the ground of a breach of trust, and for the conveyance and assignment of trust property, consisting of a variety of particulars, to the new trustees.

Mr. *Greene*, on reading the proposed minutes of the order, suggested, that the deed should be settled by the Conveyancing Counsel.

VICE-CHANCELLOR.—No. It is in cases of the reinvestment of monies in land that the deeds are settled by the Conveyancing Counsel. The deed, in a case of this nature, will be approved by the Judge of the branch of the Court to which the cause is attached.

Mr. *Schoyn*, for the Defendant.

**Depositions.****HARFORD v. REES**—*Jan. 25th, 1853.*

Depositions are not vitiated by a difference between the title of the depositions and the title of the cause, where the suit in which the depositions are taken is clearly identified.

MR. *SELWYN*, for the Defendant *Lloyd*, objected to the reception of depositions taken in the cause, on the ground that the title of the depositions differed from the title of the cause, and the depositions were not therefore in truth taken in the same cause. The cause was thus intitled:—"John Scandret Harford, John Kerle Haberfield, and Robert Phippon, for and on behalf of themselves and all persons the members of the committee of trustees and the other trustees of the *Charitable Institution in the City of Bristol, lately called and known by the name of the Bristol Infirmary, but now called or known by the name of the Bristol Royal Infirmary, and hereinafter mentioned; and the said John Scandret Harford, suing also as the present treasurer of the said institution*, Plaintiffs; and Evan Rees and John Lloyd, Defendants." In the title of one set of the depositions, the words printed above in italics were omitted. In the recent case of *Brodie v. The Grand Trunk Railway Company* (9 Hare, 823,



not reported on this point), the objection to the depositions arose from the omission of the name of one of the Defendants; and it was held, without any doubt, that the depositions could not be received. An arrangement was afterwards made by consent, on the payment of a sum of 50*l.* costs, that the evidence should be admitted, the Defendants preferring on these terms to bring the cause to an end,—but the principle was clear.

The VICE-CHANCELLOR (without calling on Mr. *Toller* for the Plaintiffs) said, the question in these cases was, whether the suit was properly identified. The depositions were intituled in a cause in which "*John Scandret Harford, John Kerle Haberfield, and Robert Phippon*, on behalf of themselves and all other persons the members of the Committee of Trustees and the other Trustees, were Plaintiffs." Mr. *Harford* sued also as the present treasurer; and there was in the bill an averment that he was the treasurer. The objection was only that he was not in the title of the depositions described as suing in one of the capacities which he filled. This omission was not material—it was unnecessary to describe the Plaintiff as treasurer in the title of the cause, when it was sufficiently averred on the record that he filled that character. It was very different from the case of *Brodie v. The Grand Trunk Railway Company*, which had been cited. There the name of a Defendant had been omitted. The witnesses appeared therefore upon the title of the depositions to have been examined in a cause to which the omitted Defendant was not a party, and there was in fact no such suit depending as that to which the depositions referred. In this case, however, no objection could have been sustained to an indictment for perjury against the witnesses, on the ground of the difference in the title; for the depositions were taken in the suit in which Mr. *Harford* was correctly described as a Plaintiff. The identity of the institution described in the cause and in the depositions was also clear and apparent throughout the whole of the record, and he therefore overruled the objection.

## Evidence.

HARFORD v. REES—*Jan. 19th, 24th, & 25th, 1853.*

The Plaintiff may, since the statute 14 & 15 Vict. c. 99, examine as a witness a Defendant in a suit in equity without prejudicing his right to a decree in the same suit against such Defendant.

THE bill charged the Defendants with possessing themselves of the assets of the testator, *James Ivyleafe*, which he had bequeathed for the benefit of the *Bristol Infirmary*. *Rees* had, in the capacity of an alleged creditor, obtained letters of administration of the estate of the testator. *Lloyd*, the other Defendant, was charged with having aided *Rees* in alienating the assets, and with having himself received a considerable portion of such assets, knowing them to be trust monies. The Plaintiff had examined the Defendant *Rees* as a witness.

On a motion for a decree the answer of a Defendant may be read against himself, without notice having been given, under the 23rd General Order of the 7th of August, 1852, of the intention to read the same as an affidavit against such Defendant; but the answer of one Defendant cannot be read against another Defendant without notice being given to such other Defendant of the intention to read it: *Cousins v. Vasey*, (App. p. lxi).

A deed mentioned in the answer of a Defendant is admissible in evidence without notice, on a motion for a decree against such Defendant.—*Semble: S. C.*, (App. p. lxi).

Depositions are not vitiated by a difference between the title of the depositions and the title of the cause, where the suit in which the depositions are taken is clearly identified: *Harford v. Rees*, (App. p. lxxviii).

Form of Order appointing an Examiner in several colonies in *Australia: Crofts v. Middleton*, (App. p. lxxv).

Mr. *Selwyn*, for the Defendant *Lloyd*, objected, that the effect of examining *Rees* was, that the Plaintiff could not have a decree against him: See *Champion v. Champion* (15 Sim. 101), *Smith v. Smith* (6 Hare, 524). The rule was founded on the interest which the witness or party had in the cause; and the cases of *Attorney-General v. Dew* (3 De G. & S. 488), and *Roland v. Witherden* (3 Mac. & G. 568), were authorities, that the alteration of the rule of law with regard to incompetency of witnesses, did not affect the rule in equity on this point. If the Plaintiff could not have a decree against *Rees*, the party charged to be primarily liable, neither could he against *Lloyd*.

Mr. *Forster* for the Defendant *Rees*.

Mr. *Toller* and Mr. *Pirie*, for the Plaintiffs, argued, that the foundation of the rule protecting from a decree a Defendant who had been examined, had been taken away by Lord Denman's Act, 6 & 7 Vict. c. 85, s. 1, which provided, that "in Courts of equity any Defendant to any cause pending in any such Court may be examined as a witness on behalf of the Plaintiff or of any co-Defendant in any such cause, saving just exceptions; and that

any interest which such Defendant so to be examined may have in the matters or any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such Defendant, but shall only be considered as affecting or tending to affect the credit of such Defendant as a witness;" and by the subsequent Act to amend the law of evidence, 14 & 15 Vict. c. 99, s. 2, providing that, "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by depositions, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

The cases cited on the other side were determined under Lord Denman's Act, which provided that it should not have the effect of rendering competent "any party to any suit, action, or proceeding, individually named in the record, or any lessor of the Plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any Defendant in replevin may make cognisance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively."

The effect of the second Act had never been considered in equity with reference to the rule of the Court which was now relied upon by the Defendant; and if that rule should be still held to be applicable, this Court would be deprived of the benefit which it was the design of the statute to give.

VICE-CHANCELLOR.—I reserved my decision upon the point as to the possibility of the Plaintiff obtaining an adverse decree against a Defendant whom he has examined as a witness. The point is one of much importance, particularly as this appears to be the first time the question has arisen for judicial determination, since the passing of the last Act to amend the law of evidence<sup>(a)</sup>, which renders a party not only competent but com-

(a) 14 & 15 Vict. c. 99.

pellable to give evidence as a witness. It appears to me, on looking at the effect of the Act, that the only obstacle against obtaining a decree in such a case has been removed.

I think there were very good reasons for the rule of this Court, and that the rule did not depend wholly on the interest of the witness. There were other grounds, on which the party examined might object to a decree being pronounced against him. There were commonly two objections in such cases: the first, which was most frequently taken by the co-Defendants in the cause, was the objection on the ground of interest. The co-Defendant said, 'you cannot read the evidence of the other Defendant against me.' It was for the sake of such other parties that the leave of the Court was required. The second ground, on which a Defendant could object to a decree being made against him on his own evidence, appears in *Kildeley v. D'Fisher* (Mos. 195). In that case the Defendant demurred to an interrogatory, because she was concerned in interest in the matter in question, and insisted that she was not obliged to prove the Plaintiff's title against herself; and that the usual allegation, that the Defendant was not concerned in interest, was left out of the order. The *Solicitor-General*, in that case, argued, that it was not a good objection on behalf of the witness, although it might be for the other Defendants; but the Lord Chancellor said, "The method of the Court is, where the Plaintiff is obliged to make several Defendants purely out of form, to give him leave to examine those who are not concerned in interest—that is, who are not interested for the Plaintiff; and it would be hard, when the Plaintiff is obliged to make parties not interested Defendants, that he should lose the benefit of their testimony; and therefore the Court gives the Plaintiff leave to examine them. But this Defendant is not a formal but a material party in point of interest. What you can expect from her examination you may have from her answer, which will be evidence against her; and, though she swears to tell the whole truth on her examination, she need not answer where her interest is concerned, of which she is to judge for herself; and therefore I allow the demurrer."

It appears, therefore, that the Defendant had the right and privilege to say, that he would not be examined as a witness. In the case before Lord *Hardwicke*, referred to by Lord *Turo* in *Rowland v. Witherden* (3 Mac. & G. 572),—the case of *Nightin-*

*gale v. Dodd* (Amb. 583),—*Buck*, a Defendant, was examined as a witness under an order; and, at the hearing, his counsel insisted, that, having been examined, no decree could be had against him; but the Court said, that if he were examined to matters as to which he was interested, he might demur. Lord *Truro* refers to the reason stated by Lord *Hardwicke*, “that, if an adverse decree were allowed to be taken against a Defendant after being examined, it would be a great temptation to Defendants to forswear themselves” (3 Mac. & G. 573). In the case of *Weymouth v. Boyer* (2 Vea. jun. 420), the rule was thus stated in the argument of Mr. *Mitford*: “There cannot be an adverse decree against a party whom the plaintiff has called as a witness; but it is the continual practice to examine trustees, &c., as witnesses, and to have a decree against them, specifically, to do the very thing they prove is to be done. A man cannot be examined for his own interest or against it, because there cannot be a decree for or against him upon his own evidence.” The authorities as to the old practice are, therefore, to the same effect. By the stat. 46 Geo. 3, c. 37, it was declared that a witness could not refuse, by law, to answer a relevant question, on the sole ground that it might tend to establish that he owed a debt or was subject to a civil suit. Upon this statute, it was held, that it did not apply to the case of one who was a Defendant in the suit in which the examination was taken.

The objection which I am now considering was taken by the Defendants in each of the cases which were referred to, and I cannot doubt (if I may presume to say so), that those cases were rightly decided. In those cases the Defendant had submitted to the examination. He had, I think, a right to object to answer the interrogatories exhibited for his examination. He might have said, ‘I may demur altogether to answer your questions; or, if I choose to answer them, I may say, that you have then contracted with me not to take a decree against me.’ In *Attorney-General v. Dew* (3 De G. & S. 491), the then Vice-Chancellor says, “It may be that they might have declined to be examined, that they might have resisted it. I think that they were not bound to decline, that they were not bound to resist.” The Defendant in this case, I think, was not obliged to answer the questions put to him on the one hand; and the cases which I have mentioned authorise me in saying that, on the other hand, he was not bound to refuse to do so, but, on the contrary, he was at liberty to say in effect: ‘I

shall answer the questions which you have chosen to put to me, and I shall then be entitled to have your bill dismissed with costs as against me.'

In this state of things, came the Act 14 & 15 Vict. c. 99, which, in my opinion, changes the whole case as respects the examination of a Defendant. It removes the only difficulty which remained in the way of that examination. It enacts that parties "to any proceeding in any Court of justice" shall "be competent and compellable to give evidence." In a case in which there is only one Defendant on the record, it is clear that the Act would be rendered perfectly a nullity in this Court, if it were to be held that the Plaintiff might indeed examine the Defendant, but that, if he did so, he lost his right to a decree against him. It was said by Mr. *Selwyn* in his argument in support of the objection, that the Act might well be applicable to cases in the Courts of common law, which were against single Defendants, or Defendants, all of whom had the same interest; but that it was not applicable to cases in this Court, in which the liabilities were different and several, and there was a disposition by each party to throw the burden on the others. It is true, there might, from the frame of suits in this Court, be often a temptation for one Defendant so to give his evidence, that it might tend to shift the responsibility from himself to other Defendants. That, however, is an objection to the evidence of the witness on the ground of interest, and, so far as that objection applies, it was removed by Lord Denman's Act. It is not indeed always at common law that the suit is against a single Defendant; and there were cases in which one Defendant at law might examine a co-Defendant against whom no evidence was produced, though the Plaintiff could not make a Defendant his witness by entering a nolle prosequi against him.

This point is no doubt one of considerable importance; but I cannot see how I can now hold, that the examination of a Defendant by the Plaintiff is an objection to a decree being made against the party examined, without nullifying, so far as regards suits in equity, one of the chief clauses of the late statute—that which relates to the examination of parties.

## Examiner.

CROFTS v. MIDDLETON—*Jan. 31st, 1853.*

MR. E. F. SMITH moved for the appointment of an Examiner, to take the examination of the Defendant *John Beale* out of the jurisdiction (a).

Form of order appointing an Examiner in several colonies in Australia.

The order was made in the following form:—

“ Let, in case the Defendant *John Beale* shall be resident at or near *Melbourne*, in the colony of *Victoria*, or in case the examination of the Defendant can be conveniently taken at *Melbourne* aforesaid or in the said colony, *John George Forbes*, of *Melbourne* aforesaid, Esquire, barrister-at-law, be appointed an Examiner for the examination of the Defendant *John Beale* in this cause, a witness on the part of the Plaintiff; and in case the said *John George Forbes*, Esq., shall die, or cease to reside within the said colony of *Victoria*, before the taking or completion of the evidence of the Defendant *John Beale*, or shall decline or be unable to take the same, let *George Milner Stephen*, of *Melbourne* aforesaid, be appointed an Examiner for the examination of the said Defendant. And let, in case the Defendant *John Beale* shall be resident at or near *Adelaide* in the colony of *South Australia*, or in case the examination of the said Defendant can be conveniently taken at *Adelaide* aforesaid, or within the said colony of *South Australia*, *John Michael Skipper*, of *Adelaide*, in the said colony, gentleman, be appointed an Examiner for the examination of the said Defendant; and let, in case the said *John Michael Skipper* shall die, or cease to reside within the said colony of *South Australia*, before the taking or completion of the evidence of the said Defendant, or shall decline or be unable to take the same, *William John Wren*, of *Adelaide* aforesaid, gentleman, be appointed an Examiner for the examination of the said Defendant. And in case the evidence of the said Defendant is taken at *Melbourne*, notice thereof is to be given to *John Trench-*

(a) See *Crofts v. Middleton*, supra, p. xviii, in which there has been an omission of some words in the judgment of the Vice-Chancellor: after the words “jurisdiction of the Court” in the second line at the top of p. xix., insert “and that, if the parties agreed to that course, he would, in this cause, appoint an Examiner in *Australia*; and the parties

might agree on the person to be named, or, if not, the Court would make the appointment. It was not a case in which the Plaintiff was entitled to have the evidence of his witness taken upon affidavit, he having refused to allow the evidence of the Defendant’s witness to be so taken.”

ard, of *Melbourne*, and , or one of them, as the agent there of the Defendants *Samuel Middleton* the elder, and *Samuel Middleton* the younger; but in case the evidence of the said Defendant is taken at *Adelaide*, notice thereof is to be given to *William Sabben*, of *Adelaide*, and , or one of them, as the agent there of the said Defendants *S. Middleton* the elder, and *S. Middleton* the younger.

### Guardian ad Litem.

BENTLEY v. ROBINSON—*Jan. 21st, 1853.*

Appointment of the solicitor of the suitors' fund as guardian ad litem to an infant Defendant, on the application of the Plaintiff, where the infant was not in default either for not appearing or not answering.

MR. *BERKELEY* moved for an order appointing the solicitor to the suitors' fund as guardian ad litem to an infant Defendant, upon service of six days notice of the motion on the solicitor by whom the infant had appeared: *Cookson v. Lee* (15 Sim. 302). The case did not perfectly come within the terms of the 32nd Order of May, 1845, as there was no default by the infant. The appearance was entered on behalf of the infant, on the 20th of November last; and an application had been made to the solicitor by whom the appearance was entered, to appoint a guardian to defend; but no such appointment had been made. The Plaintiff did not require an answer to his bill; and, therefore, there could be no default by not answering. *Wood v. Logsdon* (9 Hare, App. xxvi), was also cited.

The VICE-CHANCELLOR made the order.

### Injunction.

PROCEEDINGS on a motion for an injunction to restrain an action at law before the appearance of the Defendant to a bill of discovery: *Fitzgerald v. Bull*, (App. p. lxy).

### Inspection of Documents.

A PLAINTIFF, having the common order for himself, his solicitors and agents, to inspect documents in the possession of a Defendant, cannot appoint another Defendant as his agent in such inspection—*Seemle: Bartley v. Bartley*, (1 Drew. 232).



## Interrogatories.

FORBES v. FORBES—*Jan. 11th & 15th, 1853.*

A MOTION to discharge an order of course, obtained at the Rolls, giving liberty to the Plaintiff to exhibit further interrogatories for the examination of witnesses under the commission in the cause, on the ground that the order did not contain a restriction on the Plaintiff "not to exhibit further interrogatories to the witnesses already examined." (See 1 Daniel, Headlam's Ed., 859).

Order to exhibit further interrogatories for the examination of witnesses under a commission, not restricting the further examination to the new witnesses.

Mr. *Roll* and Mr. *Beale* for the motion.

Mr. *Anderson* and Mr. *A. Lewis* opposed it.

The VICE-CHANCELLOR said, he would inquire what the practice had been as to the insertion of the restrictive words.

On a subsequent day,

What is not a proper delivery of interrogatories, within the 12th section of the 15 & 16 Vict. c. 86, and the 17th Order of the 7th of August, 1852: *Bowen v. Price*, (1 Drew. 307).

The VICE-CHANCELLOR said, he found upon inquiry that the order issued in this case was in the common form in use prior to the year 1840. In the year 1840, it did not appear from what cause, it became the practice at the Rolls to insert the restrictive words. The practice in this respect (and which appeared to prevail at the Rolls only,) being so recent in its origin, and there being no trace of the direction of the Court under which the variation was supposed to have been made, he could not discharge the order.

## Motion for Decree.

UNDER the 26th section of the statute 15 & 16 Vict. c. 86, and the 18th General Order of August, 1852, a replication is necessary, when the decretal order has not been made, and the suit is to be proceeded with in the ordinary form; but is not necessary when the Plaintiff is proceeding by motion for a decree: *Duffield v. Sturges*, (App. p. lxxxvii).

### Oath.

THE 21st section of the statute 15 & 16 Vict. c. 86 does not involve any alteration of the form of the oath to be administered to a Defendant on putting in his answer: *Attorney-General v. Hudson*, (App. p. lxiii).

### Order.

CASES in which inquiries in Chambers may be prosecuted or made with or without an order of the Court for that purpose having been drawn up: *Kelson v. Kelson*, (App. p. lxxxvi).

### Parties.

FOWLER v. BAYLDON—Feb. 8th, 1853.

The Court will not, under the 44th section of the statute 15 & 16 Vict. c. 86, dispense with the personal representative of a trustee, where such personal representative has necessarily active duties to perform in the execution of the trust.

The 9th rule of the 42nd section of the statute 15 & 16 Vict. c. 86, applies not only to administration suits, but to all suits where the interest of the cestui que trust is represented by, and his powers are vested in, the trustee.

A BILL to execute the trusts of a term created by a marriage settlement, for raising a sum of money for the benefit of the Plaintiff. Objections were taken by the answers—first, that the settlement comprised leaseholds and premises held for terms of years, which were assigned to and became vested in trustees, named *Cartwright* and *Day*, upon the trusts of the settlement; and that there was no person before the Court representing such trustees or the estate vested in them; and secondly, that the claim of the Plaintiff, if successful, would diminish or cut down the interest of the estate of one *Lilyman*, deceased, in the property in question; and that the persons interested under the will of *Lilyman* were not before the Court.

Mr. *Walker* and Mr. *Rasch*, for the Plaintiff, submitted, that these objections were removed by the stat. 15 & 16 Vict. c. 86. The first objection, thus—*Cartwright* and *Day* were the two trustees; *Cartwright* died, leaving *Day* surviving. *Day* afterwards died, and there was no personal representative to his estate. The Court, under such circumstances, would, under the 44th section of the Act, proceed in the absence of a personal

The personal representative of a cestui que trust, entitled to the trust fund in the event of the death of children under twenty-one, dispensed with on a claim for the appointment of new trustees, the cestui que trust having died indebted, and with no other property: *Magnay v. Davidson*, (App. p. lxxxii).

representative. It was in fact only an outstanding estate, which might be got in when necessary. As to the second objection: the executors and devisees in trust of the estate of *Lilyman* were parties; and the parties beneficially interested were not now necessary parties. Their presence was dispensed with by the 9th Rule of the 42nd section.

The VICE-CHANCELLOR, as to the first objection, said, he was of opinion that the 44th section did not enable the Court to dispense with a party, who, in the circumstances of the case, should be active in the execution of the decree which the Court was called upon to make, as in this case the personal representative of the surviving trustee of the property must necessarily be.

Mr. *Rolt* and Mr. *Rogers*, for the Defendants, contended that the parties interested in the estate under the will of *Lilyman* were also necessary parties. The bill was filed before the New Procedure Act passed.

The VICE-CHANCELLOR.—My predecessor decided, in the case of *Goldsmid v. Stonehewer* (Ante, App. I. p. xxxviii), that the Court might apply these provisions of the Act as to parties to suits instituted before the Act passed.

Mr. *Rogers*.—That would be unjust. The answers are put in, and the objections taken, on the foundation of the old practice and law of the Court.

The VICE-CHANCELLOR.—The suitors of the Court have no vested interest in any rule which might require more parties to suits than are necessary. You made the objection rightly by your answer, that persons who were required to be made parties by the then practice of the Court were not parties to the suit; and then came a beneficial Act of Parliament, which relieved the Plaintiff from the necessity of bringing them before the Court.

Mr. *Rogers* then contended, that the 9th Rule of the 42nd section applied only to cases where the real or personal estate vested in trustees was sought to be charged by the suit, or where the suit was brought to administer or enforce the trusts of the will or other instrument.

The VICE-CHANCELLOR.—In the case of *Goldsmid v. Stonehever*, the provision was applied with some special directions to a suit for foreclosure. I think the operation of the rule is not so restricted as it has been argued that it is; and it appears to me that the parties beneficially interested in *Lilyman's* estate are not necessary parties; they are sufficiently represented by the trustees.

JONES v. JAMES—Feb. 10th, 1853.

Decree for the appointment of new trustees and conveyance of the trust estate, in a suit by some cestuis que trusts against the devisees of the last survivor of the former trustees, and a direction to serve the other cestuis que trusts with notice of the decree.

*EDMUND ECKLEY*, in 1834, devised to *Snead* and *James* certain freehold estates, to hold to them and their heirs, to the use of them and their heirs, upon trust, that they or the survivor should sell the same after the death of his (testator's) wife, with power to give receipts for the same, which should discharge and exonerate the purchasers; and he directed that the monies arising from such sale, and the rents and profits until the sale, should be applied first in the payment of the costs and in keeping the premises in repair until the sale, and next in payment of various legacies (two of which were given to the Plaintiffs, *Ann Jones* and *Sarah Cartwright*), which legacies were to be paid within twelve months after his wife's decease, out of the proceeds of the sale of his estates and his personal effects, the sale monies to be considered as so much personal property. And the will empowered *Sarah Eckley*, the testator's wife, to appoint a trustee in the place of any deceased trustee; and the testator gave the residue of his personal estate and all his other property to his wife for her life, and after her decease as she should by deed or will appoint. *Snead* died and left *James* surviving. *Sarah* did not appoint a new trustee; and she died in 1848, having by her will and codicil, dated in 1846 and 1847, bequeathed various legacies and given all the residue of the estate and effects of her late husband, and all her property, unto *Jay* and *James*, upon trust for the Plaintiffs, *Ann Jones* and *Sarah Cartwright*, for their respective separate use. *James* died in 1850, having devised all his trust estates to *Penelope James*, and *Abigail Pitt*. The Plaintiffs, *Ann* and *Sarah*, filed their bill against *Penelope James* and *Abigail Pitt*, stating that the trusts for sale of the estates were unperformed, that doubts had been suggested whether the Defendants could make a conveyance or give a receipt to a purchaser; and it prayed that new trustees might be appointed.

There was evidence of no appointment of a trustee having been made by the widow, and also of the fitness of the proposed trustees. It was also stated that some of the legacies had been paid.

Mr. *Rolt* and Mr. *Whitbread*, for the Plaintiffs, submitted, that as, under Rule 4 of the 42nd section of the stat. 15 & 16 Vict. c. 86, any cestui que trust might have a decree for execution of the whole trust, à fortiori might one cestui que trust have a decree for the appointment of new trustees, which was less than the execution of the trust.

The VICE-CHANCELLOR made the decree for the appointment of the proposed trustees, and that the Defendants should convey to such new trustees the estates devised by the will in trust for sale:—the conveyance to be settled. Notice of the decree to be served (under the 8th Rule) upon the parties interested in the real estate under the wills of the testator or his widow, and whose interests under the same should not appear to be satisfied.

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### Payment into Court.

PROSPECTIVE order, enabling parties to pay in money from time to time to the credit of the cause, obviating the necessity of a repetition of the orders for the same purpose: *Hutchinson v. Hutchinson*, (App. p. lxxxiv).

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### Payment out of Court.

PROSPECTIVE order for the sale, from time to time, of so much of the capital of a fund as would be sufficient, with the income, to pay an annuity which the income alone was insufficient to pay: *Lambie v. Lambie*, (App. p. lxxxiv).

An order for the settlement of the conveyance, and for the payment of the purchase-money out of Court, on the re-investment of monies of incapacitated persons, &c.: *In the Matter of Caddick's Settlement*, (App. p. lxxxv).

## Personal Representative.

MAGNAY v. DAVIDSON—Feb. 21st, 1853.

A claim for the appointment of new trustees allowed to proceed in the absence of a personal representative of a deceased person, where such person had an interest in the trust funds in the event of the death of his child (the infant Plaintiff) under twenty-one, but had died indebted, and without any other property.

The Court will not, under the 44th section of the stat. 15 & 16 Vict. c. 86, in a suit for the administration of an estate, dispense with a personal representative, constituted in the ordinary way, of the testator or intestate whose estate is to be administered in the suit: *Silver v. Stein*, (1 Drew. 295).

The Court will not, under the 44th section of the stat. 15 & 16 Vict. c. 86, dispense with the personal representative of a trustee, where such personal representative has, necessarily, active duties to perform in the execution of the trust: *Fowler v. Boydell*, (App. p. lxxviii).

A personal representative of a deceased party, entitled to a small sum of money, (28*l.*), not dispensed with, under the 44th section of the Act 15 & 16 Vict. c. 86, by enabling the solicitors of the deceased party to receive such sum: *Rawlins v. M'Mahon*, (1 Drew. 225). See *Hawkins v. Dodd*, (1 Hare, 146).

MR. WALFORD, under the 44th section of the stat. 15 & 16 Vict. c. 86, asked, that a person might be appointed to represent the estate of *A. Magnay* for the purposes of the suit, or that the claim, which was for the appointment of new trustees, might proceed in the absence of any person representing his estate.

The trust funds, consisting of monies in the funds, and monies due on mortgage and covenant, were settled on the marriage of *A. Magnay* and *Mary Anne Charlotte*, his wife, upon certain trusts during their lives; and, after the decease of the survivor, in default of appointment, in trust for the children of the marriage, who, being sons, should attain twenty-one, or being daughters should attain that age or marry, with power to apply the income in the maintenance of the children during their minority, with an ultimate power of appointment by the will of the wife, in case there should be no such child. The wife died in 1844, having by her will executed her power of appointment in favour of her husband. *A. Magnay*, the husband, died much indebted in 1850, and the bill stated that at the time of his death he was not possessed of or entitled to any estate or effects except his contingent interest in the settled funds; and that no steps had been taken, or were likely to be taken, for obtaining letters of administration to his estate or effects. All the other persons having interests in the fund were plaintiffs.

The Defendant *Davidson*, one of the three trustees of the settled property, was desirous of retiring, and the claim prayed for the appointment of *W. Rothery* in his place, and to have the amount of what was due to the Defendant *Davidson*, in respect of any costs, charges, and expenses, properly paid or incurred by him as a trustee, duly ascertained; and to have the same, and the costs of the suit, and of proceedings which had been taken in Chambers upon summons, paid out of the capital of the fund.

and the residue transferred into the name of the new and continuing trustees.

The VICE-CHANCELLOR was of opinion that it was a case in which the claim might properly proceed in the absence of a personal representative of *A. Magnay*.

### Printed Bills.

ANONYMOUS—*Jan. 21st, 1853.*

MR. BAGSHAW mentioned to the Court, that the printers of bills were in some cases acting under the impression that they were not at liberty to print them with any form of punctuation, and were also bound to print all numerical statements of money or other subjects in words at length, and not in figures.

Numerical statements in bills may be printed in figures and not in words at length.

The VICE-CHANCELLOR said, he should be unwilling to adopt a construction of the Orders, or of the New Procedure Act, which would have the effect of laying down a general rule, without the concurrence of the other Judges; but he might say that he knew of no rule of the Court which prevented numerical statements from being printed in figures.

### Proceedings before the Judge in Chambers.

THE VICE-CHANCELLOR said, that the Judges had considered the cases of applications under the Trustee Acts of 1850 & 1852, and the Legacy Duty Act (a), which they had originally intended to take by summons at Chambers; but which, upon further consideration, they were of opinion should be made by petition, and, in the first instance, should be always made in Court.

Petitions to be presented under the Trustee and Legacy Duty Acts instead of proceeding by summons in Chambers.

In *Magnay v. Davidson*, (App. p. lxxxii), the claim stated that proceedings had lately been commenced upon summons in the Chambers of Vice-Chancellor Wood, for the appointment, under the provisions of the Trustee Act, 1850, of *W. Rothery* as a trustee of the indenture of settlement therein mentioned, in the place of the Defendant *M. S. Davidson*, but the same could not be proceeded with in consequence of the said *M. S. Davidson* refusing to retire from the trust without payment to him of the costs, charges, and expenses claimed to be due to him, and the impossibility of ascertaining, in such proceeding, what, if anything, was due and owing to him, the said *M. S. Davidson*, in respect of such costs, charges, and expenses.

(a) Ante, App. I. p. xlix. arts. 5 & 7.

## Prospective Order.

LAMBIE v. LAMBIE—*Jan. 18th, 1853.*

Prospective order for the sale, from time to time, of so much of the capital of a fund in Court as would be sufficient, with the income, to pay an annuity which the income alone was insufficient to pay.

IT became necessary to provide for the payment of an annuity, which the dividends of the fund in Court were insufficient to answer.

Mr. *Bates*, for the Plaintiff, and Mr. *Rendall*, for the Defendant, asked for a prospective order for the application from time to time of a sufficient portion of the capital to supply the deficiency of the dividends.

The Registrar (Mr. *Leach*) referred to a case in which a similar provision had been made for the future payment of an annual sum, where the dividends were insufficient.

The VICE-CHANCELLOR directed the dividends of the fund in Court to be paid to the annuitant, in part satisfaction of the annuity, and directed a sale of so much of the corpus of the fund as should from time to time be sufficient, with the dividends, to pay the annuity.

HUTCHINSON v. HUTCHINSON—*April 29th, 1852.*

Prospective order enabling parties to pay money from time to time to the credit of the cause, obviating the necessity of a repetition of the orders for the same purpose.

DIRECT the Defendants *J. H.* and *E. S. H.*, on or before the — day of —, to pay the several sums of £— recently received by them, and admitted by them to belong to the estate of *J. P. H.*, the testator &c., into the Bank, with &c. [to be laid out, and trust declared]; and let the Defendants *J. H.* and *E. S. H.* be at liberty, from time to time, to pay into the Bank to the credit of this cause by the title aforesaid, any sum or sums of money in their hands in respect of the said testator's estate (the amount of such sum or sums to be verified by affidavit); and let the said sum or sums of money, when so respectively paid in, be, from time to time, as the same shall amount to a competent sum, laid out, &c. in trust in this cause by the title aforesaid.

Mr. *J. B. Allen*, for the Defendants.



## Purchase Deed.

In the Matter of CADDICK'S SETTLEMENT—*Jan. 31st, Feb. 18th,*  
1853.

A PURCHASE, for the reinvestment of monies paid into Court upon a compulsory taking of land, having been approved of by the Court (a), and the title having been approved of by the Conveyancing Counsel, subject to a search for judgments, which the Conveyancing Counsel thought necessary, as against *Elisha Caddick*, the tenant for life of the property in right of his wife, by whom the contract for the purchase was made. This necessity arose from the circumstance of Mr. *Caddick* having entered into the contract in his own name, without referring to the fund in Court from which the purchase-money was to be paid; and the Conveyancing Counsel therefore was of opinion, that Mr. *Caddick* had acquired the equitable fee. It was found, that, some years before, Mr. *Caddick* had entered into a bond to the Crown, and steps were therefore taken to obtain a quietus.

Application was now made to the Court for the payment of the purchase-money, upon the execution of the conveyance. An affidavit was made, that satisfaction had, on the 12th of February, 1853, been entered "in the proper book kept at the Registry of Judgments Office in *Serjeants' Inn, Chancery-lane*, in respect of an obligation or specialty, bearing date the 15th day of March, 1843, whereby the said *Elisha Caddick* was bound to the Crown in the sum of 1600*l.*; and that all liability on the part of the said *Elisha Caddick* thereunder has ceased."

An order for the settlement of the conveyance, and for the payment of the purchase-money out of Court, on the re-investment of monies of incapacitated persons, &c.

Effect of a contract for the purchase of lands for the reinvestment of trust monies being made without reference to the fund proposed to be thereby reinvested.

The VICE-CHANCELLOR said, that the engrossment must be produced, with a blank for the insertion of the recital of the order of the Court for the payment of the purchase-money.

The engrossment was afterwards produced in Court, and verified in the following manner:—

"I *S. B.* make oath and say, that I have examined the engrossment now produced and shewn to me, written on two skins of parchment, and marked on the outside thereof with the letter *A.*, with the draft now also produced and shewn to me, and mark-

(a) See *In the Matter of Caddick's Settlement*, Ante, App. I. p. ix.

ed on the outside thereof with the letter *B.*, and which draft was settled by *William Hayes, Esq.*, one of the Conveyancing Counsel appointed by this Honourable Court; and that the said engrossment is a true and correct copy of the said draft, except as to the indorsements made on the back of the said draft."

The VICE-CHANCELLOR ordered, that, upon the completion of the engrossment by the insertion therein of a recital of the order now made, and upon due execution of the conveyance by all proper parties, to be verified by affidavit, the sum of 2500*l.* should be paid out of Court to *F. R.*, the vendor, &c.

### Reference.

KELSON *v.* KELSON—*Jan. 24th & Feb. 11th, 1853.*

Cases in which inquiries in Chambers may be prosecuted or made, with or without an order of the Court having been drawn up directing such inquiries.

A QUESTION in the cause was, whether a settlement was voluntary, which was expressed to be made for "divers good and valuable considerations." No evidence had been given on the question of consideration; and the Court was of opinion, that the parties ought to have an opportunity of shewing whether there was or was not a valuable consideration for the deed; and the case was adjourned to Chambers for that purpose.

*Mr. Roll* and *Mr. Grove* for the Plaintiff, and *Mr. Karstak* for the Defendant.

It was subsequently made a question, whether there should be an order of the Court drawn up before evidence was received in Chambers applicable to the inquiry, the Registrar doubting whether an order ought to be drawn up, and the Chief Clerk, whether he ought to proceed in the inquiry without such order.

The VICE-CHANCELLOR said, he had spoken with the Chief Clerk on the subject, and it had been suggested to him, he thought with reason, that there was a distinction between this case and that of *Saunders v. Walter* (a). In *Saunders v. Walter*, there were several affidavits directed to a very complicated state of things, into which it was not easy to enter fully in Court; and the Vice-Chancellor thought that the subject would be more con-

(a) Ante, App. I. p. v.

veniently examined in the first instance in Chambers. In that case an order was not necessary. In this case, the inquiry was not upon any evidence actually before the Court in the cause, but fresh evidence would be necessary, and therefore an order directing the inquiry should be drawn up. There was a fee of 4*l*. payable on every decree or decretal order (a); but it must not be forgotten that many fees of the Court had been abolished.

(a) General Order, 25th October, 1852.

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PIDDOCKE v. SMITH—*Jan. 14th, 1853.*

ON a claim relating to the estate in this cause, before the New Procedure Act, it was referred to the Master to take the accounts of the trust. A second suit was instituted involving the accounts of the same estate, with some additional inquiries as to mines. On the hearing of the second cause, this day, it was asked that the Court, instead of taking the inquiry with the assistance of the Chief Clerk, would refer it to the Master to whom the former accounts had been referred.

Reference to the Master under section 10 of the Act 15 & 16 Vict. c. 80, of a cause heard since the first day of Michaelmas Term, 1852.

The VICE-CHANCELLOR, under the provision of the Act (15 & 16 Vict. c. 80, s. 10), made the reference to the Master, as being a case in which it was expedient to do so, from the previous reference made in the other cause.

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Replication.

DUFFIELD v. STURGES—*Jan. 14th, 1853.*

NOTICE of motion for a decretal order had been given. The Plaintiff, acting on the supposed directions of the 26th section of the statute 15 & 16 Vict. c. 86, and the 28th General Order of the 7th of August, 1852, tendered a replication. The Clerk of Records and Writs considered that a replication was inconsistent with a motion for a decretal order.

Under the 26th section of the statute 15 & 16 Vict. c. 86, and the 18th General Order of August, 1852, a replication is necessary when the

decretal order has not been made, and the suit is to be proceeded with in the ordinary form; but is not necessary when the Plaintiff is proceeding by motion for a decree.

Notice of filing the replication under the 26th section of the stat. 15 & 16 Vict. c. 86, and the 28th General Order of August, 1852, allowed to be inserted in the Gazette, and in two newspapers of the county in which the Defendant was known to have last resided,—in a case in which the Plaintiff had entered an appearance for the Defendant, and no place had been fixed for service of notices: *Barton v. Whitcomb*, (Lords Justices, 17 Jur. 81).

Mr. *Hare*, for the Plaintiff, applied to the Court for a direction that the replication should be filed. The clauses in the Act and the Orders seemed imperative—"issue shall be joined by filing a replication" (a. 26); and "issue is nevertheless to be joined by filing a replication" (Order 28). The Act and Order might, however, certainly apply to cases where the motion for the decretal order might have failed, and it had become necessary to proceed with the suit.

Mr. *W. M. James* and Mr. *C. Barber*, am. cur., said, that such were in fact the cases, to which the direction referred to,—as to filing the replication,—was intended to apply.

The VICE-CHANCELLOR said, that the replication was not necessary where the Plaintiff was proceeding to move for a decretal order and the notice of motion was pending.

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## Revivor and Supplement.

ENGLISH v. HAYMAN—*Jan. 27th, 1853.*

Order in the nature of a supplemental decree, for a creditor who had proved his debt to carry on a creditor's suit, where the original Plaintiff had become bankrupt.

MR. *GRENSIDE* moved for an order, that *James Lester*, a creditor, who had proved his debt before the Master in a creditor's suit, might be at liberty to prosecute and carry on the decree, in consequence of the Plaintiffs having been declared bankrupts. The application was made upon affidavit of the bankruptcy, and notice to the assignees and to the Defendant. He suggested, that all that was now necessary was a supplemental order, under the 52nd section of the Act 15 & 16 Vict. c. 86.

— The VICE-CHANCELLOR made the order.

The 52nd section of the stat. 15 & 16 Vict. c. 86, enables the Court to make an order to the effect of the usual supplemental decree, where the object is to bring before the Court the trustees under a settlement of the property of an infant plaintiff, made after the institution of the suit: *Atkinson v. Parker*, (2 De G., Mac., & G. 221); and also to introduce on the record a child, a member of a class interested in the property in question in the cause, born after the institution of the suit: *Fullerton v. Martin*, (1 Drew. 238).

## Service.

DISMISSAL of claim, the Plaintiff not appearing, without affidavit of service: *Charlton v. Allen*, (App. p. lxvii).

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## Service of Decree or Order.

DECREE for the appointment of new trustees and conveyance of the trust estate, in a suit by some cestuis que trusts against the devisees of the last survivor of the former trustees, and a direction to serve the other cestuis que trusts with notice of the decree: *Jones v. James*, (App. p. lxxx).

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## Signing the Registrar's Book.

GURNEY *v.* BEHREND—*Feb. 10th, 1853.*

ON dissolving an injunction, restraining the delivery of a cargo of wheat, with liberty to the Plaintiffs to bring such action for the wheat as they might be advised, the Plaintiffs accepted the security of *Hambro & Son*, who were not parties to the cause, for the amount of any damages and costs which they might recover in the action; and the following is a minute of the order as to the manner of giving such security:—"The Defendants, undertaking to procure that Messrs. *Hambro & Son* shall sign the Registrar's Book, and undertake to answer the amount of any damages and costs which the Plaintiffs may recover on any action brought by them respecting the cargo of wheat, as the Court shall direct; and, by consent, the Defendant *Zielke* undertaking to admit the delivery to the order of *Behrend*, and the Defendants the *Behrends* undertaking to admit the receipt of the cargo of wheat—let the injunction be dissolved.

Undertaking, by way of agreement, to answer a possible liability, or to observe the order of the Court, entered into by a stranger to the cause, by signing the Registrar's Book.

The VICE-CHANCELLOR adverted to some cases in which the Lords Justices had recorded the undertaking of persons not parties to the cause, by such persons signing the Registrar's Book.

Mr. *Rolt* and Mr. *Renshaw* for the Plaintiffs, and Mr. *Cairns* for the Defendants.

THOMPSON v. TEUTON—*Jan. 24th, 1853.*

Suspension of an order for payment of money into Court.

AN order had been made for payment, by a Defendant, of a certain sum into Court on or before the 24th of January. The Defendant moved for, and shewed grounds which led the Court to give, a further week's time for the payment.

Mr. *Rolt* asked, that the order might be forthwith entered with the Registrar. The Plaintiff would be unable to get another order drawn up and served within the week.

The order was made in the following form:—"The Defendant *Robinson* undertaking, by his counsel, to pay into Court, within one week from this time, the sum of £—, ordered that he have liberty to pay in the same accordingly, notwithstanding the time mentioned in the former order has expired; and no attachment is to issue against the Defendant in the meantime."



## Stamp.

BRAIN v. BRAIN—*Jan. 13th, 1853.*

Mode of payment of the 1*l.* stamp on filing bills.

Amendment of a petition, the necessity for which was created by the marriage of the petitioner, without a fresh stamp: *Robinson v. Harrison*, (1 Drew. 307).

AN injunction bill, engrossed on parchment and not printed. The Plaintiff's solicitor proposed, on filing it, to pay the 1*l.* for the stamp, and affix on the engrossment eight labels or adhesive stamps of the value of 2*s.* 6*d.* each. The Clerk of Records and Writs was stated to have expressed an apprehension that the adhesive labels might, in course of time, become separated from the engrossment; and he considered that the stamps on bills should be affixed in the more secure way in use at the Stamp-Office.

The VICE-CHANCELLOR said, that the stamps might be affixed as proposed by the Plaintiff.

## Supplemental Statement.

LEE v. LEE, LYS v. LEE—*Jan. 29th, 1853.*

MR. *SPEED* applied, under the 53rd section of the stat. 15 & 16 Vict. c. 86, and the 44th General Order of the 7th of August, 1852, on behalf of a Defendant having the conduct of the cause, for leave to file in the Record and Writ Clerk's Office, and annex to the bill, a statement by way of supplement, to bring new parties before the Court.

The Defendant, although he has the conduct of the cause, is not therefore enabled, under the 53rd sect. of the statute 15 & 16 Vict. c. 86, and the 44th General Order of the 7th of August, 1852, to file a statement of additional facts or circumstances occurring after the institution of the suit, to be annexed to the bill.

It was an old cause. There was a question of priorities of incumbrancers. The conduct of the cause had been given by the Master to the Defendant. The Master by his draft report had found, that all the incumbrancers on the property, except two, were parties to the suit; but he was of opinion, or the Defendant having the conduct of the cause was advised, that the two absent incumbrancers ought to be made parties to the suit. The statement, which it was proposed to file, would contain the facts necessary to bring the two other incumbrancers before the Court, as if such facts were embodied in a supplemental bill.

The VICE-CHANCELLOR held, that neither the 53rd section, nor the 44th General Order, enabled a Defendant to file a statement of facts to be annexed to the bill. The Plaintiff alone was referred to in the Order, and was, he thought, alone contemplated by the 53rd section of the statute. To allow the Defendant to annex the new statement, would be in effect to allow the Defendant to amend the Plaintiff's bill.

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## Undertaking.

UNDERTAKING, by way of agreement, for observing the order of the Court, entered into by a stranger to the cause, by signing the Registrar's Book: *Gurney v. Behrend*, (App. p. lxxxix).





# I N D E X

TO THE

## PRINCIPAL MATTERS.

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### ABSTRACT.

See APPENDIX, p. i.

### ACCOUNT.

1. Demurrer allowed to a bill for an account, where it did not appear that the account between the Plaintiff and Defendant was mutual, as consisting of receipts and payments by each party on account of the other, and where it did not appear that the payments forming one side of the account were other than matters of set-off as against the receipts on the other side, and notwithstanding a statement in the bill that the Defendant had, in a particular sale or transaction, acted as the agent of the Plaintiff in receiving monies on his account. *Phillips v. Phillips*, 471

2. Where a conveyance of an estate, obtained upon a pretended purchase from an aged and illiterate man, by a person who stood towards him in a confidential position, was set aside, the Court, being of opinion that there was in fact no purchase, refused to give the Defendant a decree for an account of monies paid by or owing to him, which he alleged (but failed to prove) was the consideration agreed upon for such purchase and convey-

ance. The rule, that a party coming for equity must do equity, does not extend so far as to affect matters unconnected with the transaction in respect of which the relief is sought. *Wilkinson v. Fowkes*, 592

3. It does not follow, that, because a principal is entitled to have an account taken in equity as against his agent, the agent has a similar right against his principal; for the right of the principal rests on the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal. *Padwick v. Stanley*, 627

### ACCOUNT OF PERSONAL ESTATE.

See APPENDIX, p. vii.

### ACCOUNTS AND INQUIRIES.

See APPENDIX, p. i.

### ACCUMULATION.

1. A direction by will, to pay out of the testator's property the premiums upon a policy of insurance, effected by the testator upon the life of another person, is valid for the whole life insured, and is not an accumula-

tion, by the *Thelluson* Act (39 & 40 Geo. 3, c. 98), restricted to twenty-one years only. *Bassil v. Lister*, 177

2. Where a gift to children is not made or secured to them out of property springing from or settled upon their parents, and there is nothing in the nature or context of the instrument to impress upon the gift the character of a portion, it is not a portion within the meaning of the 2nd section of the *Thelluson* Act; and the circumstance, that the gift is a part of the estate of which the parent is the residuary legatee, has not the effect of giving to the gift the character of a portion. *Jones v. Maggs*, 605

3. There is no reason, and it is contrary to the policy of the *Thelluson* Act, to put a strained or forced construction on the term "portions for children" contained in the 2nd section of that Act. *Ib.*

4. Under the *Thelluson* Act, the residuary legatee was held to be entitled, at the expiration of twenty-one years, to the accumulations of a legacy given to the children of the testatrix's brother, and directed to be divided amongst them when they should attain twenty-one. *Ib.*

### ACQUIESCENCE.

1. Acquiescence by one of several co-plaintiffs in the act complained of, precludes the interference of the Court upon an interlocutory application, as much as upon decree; and the rule is the same, although some of the co-plaintiffs are infants. *Marker v. Marker*, 15

2. Parties cannot be said to acquiesce in the claims of others, unless they are fully cognisant of their right to dispute them. *Marker v. Marker*, 16

3. Effect of notice that a claim will be resisted in excluding an objection

### AGREEMENT.

to relief on the ground of laches or acquiescence. *Morison v. Moat*, 266

### ADMINISTRATION SUIT.

A creditor's suit stayed, on the application of the executors, after a decree in a suit by residuary legatees for the administration of the same estate, notwithstanding there might be inquiries directed in the legatees' suit, which would not have been necessary in the creditors' suit; it being competent to the Master to make a separate report, and thereby prevent the payment of the creditors from being delayed by the business of the ultimate administration of the estate. *Golder v. Golder*, 276

### ADMISSION.

*See* COPYHOLD.

### AFFIDAVIT.

*See* APPENDIX, p. vii.

Form of order, by consent, for hearing a cause upon affidavits. *Sparrow v. The Oxford, Worcester, and Wolverhampton Railway Company*, 448

### AGENT.

*See* VENDOR AND PURCHASER, 1, 4.

### AGREEMENT.

*See* JURISDICTION, 2.

LIFE INSURANCE, 2,

PUBLIC POLICY.

SHIP.

SPECIFIC PERFORMANCE.

RAILWAY COMPANY.

VENDOR AND PURCHASER.

1. If, upon a proposal and agreement for a life insurance, a policy be drawn up by the insurance office in a form which differs from the terms of the

agreement, and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement, and not on that of the policy. *Collett v. Morrison*, 162

### ALIENATION.

1. A bequest of a share of residuary personal estate in trust for *A.* for life, and after the decease of *A.* for his children equally, to be vested interests in such children at twenty-one, with power to apply the income for their maintenance during their minorities, and a gift over on default of such children; and a proviso, that if *A.* should in any manner sell, assign, transfer, incur, or otherwise dispose of or anticipate his share or any part thereof, then, immediately after such alienation, sale, assignment, transfer, or disposition, the bequest in trust for *A.* should cease, determine, and become utterly void, as if the same had not been mentioned in the will, or as if *A.* were dead. *A.*, being in prison for debt, presented a petition for his discharge under the Act 1 & 2 Vict. c. 110, and thereupon the vesting order was made:—*Held*, that there was a valid limitation over of the share of *A.*; that taking the benefit of the Insolvent Act was a voluntary alienation of his share by *A.*, and was the event or one of the events on which the limitation over was to take effect; that the declaration in the will, that the gift should thereupon be void as if the same had not been mentioned in the will, applied to the event of there being no children; and the declaration, that it should be void as if *A.* were dead, to the event of there being children; that, although the limitation over took effect, the capital was not to be necessarily forthwith divided, for the determination of the life-interest did not alter the class which was to take, and which class

included after-born children; that the children of the insolvent who had attained twenty-one had a vested interest in their respective shares of the residuary share bequeathed in trust for the insolvent, and had become entitled to receive the interest of the same; and that the infant children of the insolvent were entitled to contingent interests in their respective shares thereof; and that both interests were subject to the interests of any after-born children of the insolvent who might become entitled. *Rockford v. Hackman*, 475

2. Property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift; and although a life interest be expressed to be given, it may be well determined by an apt limitation over. *S. C.*, 480

3. Import and effect of Lord *Ellenborough's* judgment in *Brandon v. Robinson*. Distinction between a disposition to a man until he shall become bankrupt and after his bankruptcy over, and a gift to a man for life with a proviso restraining alienation. *S. C.*, 482

4. Distinction between compulsory and voluntary alienation. *S. C.*, 484

### AMENDMENT.

See APPENDIX, pp. viii, lxi.

### ANNUITY.

1. Amongst several gifts of sums of 300*l.* each to the grand-nephews and nieces of the testator, some of which were to be paid at different ages, and others to be sunk in annuities for the lives of the respective legatees, occurred two bequests, as follows:—“*Joseph Walker*, 300*l.* annuity for life; *Martha* —, 300*l.* annuity for life:”—*Held*, that *Joseph* and *Martha* were each entitled to annuities of 300*l.* for life. *Walker v. Tipping*, 800

2. Order providing for a contingent annuity for the life of a future wife of the son of the testator. *Aaron v. Aaron*, 821

### ANSWER.

See APPENDIX, p. lxi.

### APPOINTMENT.

1. The Court will not entertain a suit to set aside an appointment of a part of certain trust funds as a fraud upon the power, when it appears that another appointment, not impeached by the bill, was made of funds subject to the same power, in which regard was had to the appointment complained of, and the object was to equalise the interests of the several appointees; for the Court will not undo part of an entire transaction, the other parts of the same transaction not being brought within its jurisdiction. *Harrison v. Randall*, 397

2. Where there is an appointment to *A.* and *B.* by one instrument, (and a fortiori by different instruments), the appointment to *A.* may be good, and the appointment to *B.* bad, and *A.* and *B.* may well agree between themselves that the bad appointment shall not be disturbed. *Ib.*

3. Certain policies of insurance effected by a father on his life as a provision for his daughters, were assigned to a trustee, upon trust for such of the daughters as the father should appoint; and certain estates were devised to the same trustee, upon trust, out of the rents and profits, to secure the payment of the premiums. The trustee advanced some sums of money in payment of the premiums, and the father appointed the bonuses which had accrued upon the policies to three of his daughters; and the three daughters soon afterwards authorised the trustee to receive the sum paid by the office for the bonuses, and invest

part thereof as a fund to keep down the premiums, and a part of the sum was applied in satisfaction of the arrears of such premiums. A subsequent appointment was made, in favour of the other daughters, of the residue of the sums to be received on the policies, and which was intended to equalise the shares:—*Held*, that the first appointment was a fraud upon the power, its immediate object being to relieve the father, and its necessary consequence to relax the diligence of the trustee in enforcing the rights of the daughters against the father; and that the application of the trust funds, in pursuance of the appointment by the trustee, who knew that the appointment was fraudulent, was a breach of trust, for which he was responsible to the objects of the power. *Ib.*

4. Effect of an agreement between several appointees under different appointments, as between such appointees and the trustees of the property, that one of the appointments, which is invalid, shall not be disturbed. *S. C.*, 409

5. A testatrix, having a power of appointing a sum of 10,000*l.* secured by a term of five hundred years, and having also a power of appointing the fee of the lands on which the money was secured, by her will devised her lands to *A.* for life, with remainder to *B.* in tail, and gave to *A.* all the residue of her personal estate:—*Held*, that the 10,000*l.* passed under the residuary gift of the personal estate. *Clifford v. Clifford*, 675

6. By a marriage settlement, monies in the funds, monies lent on mortgage, and other property, were assigned to trustees, upon trust, to pay and transfer the same unto such persons, for such estates or interests, either absolutely or conditionally, and in such parts, shares, and proportions, manner and form, and under and sub-

ject to such powers, provisos, &c., either for the benefit of the issue of the intended marriage, or of any other persons whomsoever, as the wife, notwithstanding her coverture, at any time or times, and from time to time during the joint lives of herself and her husband, should, by and with the consent and approbation of her husband, testified in writing under his hand and seal, or as the wife alone, after the decease of the husband, in case she should survive him, should by any deed or writing, to be sealed and delivered by her in the presence of and attested by two or more witnesses, direct or appoint, and in default of such direction or appointment, and in the meantime and until such direction or appointment should be made and executed, and subject thereto, and as to so much of the said trust monies, &c., whereof no such direction or appointment should be made, upon trust, to receive the annual proceeds due and to grow due for or in respect of the same, and pay the same to such persons as the wife, during her life, notwithstanding her coverture, and whether sole or covert, should from time to time, by any writing or writings under her hand, direct or appoint to receive the same, and in default of such direction or appointment, into the proper hands of the wife for her separate use. The monies in the funds were transferred to the husband by virtue of powers of attorney under the hand and seal of the wife, with the consent of the husband under his hand and seal, and attested by two witnesses; and the mortgage money was received, and a receipt given by the husband and wife, and the premises reconveyed, and the receipt and reconveyance also so attested.

*Held*, that the powers of attorney were not directions, but were merely authorities to the bankers by the wife to assign the stock to her husband,

and only enabled the bankers to do for her what she might have done for herself without their intervention. That, as the directions must follow on the authorities before the authorities could be acted on, it still remained to make the appointment after the execution of the powers of attorney; and that the transfers made subsequently to such execution, being unaccompanied by any of the formalities required by the settlement, could not have the effect of converting instruments of substitution into instruments of alienation, and could not operate as executions of the power of appointment. *Hughes v. Wells*, 749

7. That the wife had no power to dispose of the trust funds otherwise than by a perfect appointment. *Id.*

8. That, in order to constitute a purchaser in whose favour a defective execution of a power will be aided in equity, there must be a consideration and an intention to purchase, either proved or to be presumed; and the maintenance of his household and establishment by the husband does not furnish such consideration to the wife. *Id.*

9. That, if the transfer of a wife's legacy to herself by the husband be a consideration, it does not shew any intention to purchase. *Id.*

### APPORTIONMENT.

1. An annuity bequeathed by will, and directed to be paid out of a moiety of the rents, issues, profits, dividends, interest, and proceeds of the real and personal estate of the testator, after the expiration of a life-interest therein,—*Held* not to be primarily payable out of the personal estate of the testator, but to be apportionable between the real and personal estates. *Falkner v. Grace*, 282

2. A legacy directed by an appointment in pursuance of a will to be

raised by mortgage of the moiety of the residuary real and personal estate, on the expiration of a life-interest in such moiety, and the residue of such legacy, and another legacy directed to be raised and paid by mortgage or sale of the whole or any part of the real and personal estate, on the expiration of another life-interest,—*Held* not to be charges primarily payable out of the personal estate, but to be apportionable between the real and personal estate. *Ib.*

#### APPROVAL OF PURCHASES AND TITLES.

*See* APPENDIX, p. ix.

#### ASSETS.

*See* LETTERS OF ADMINISTRATION.

#### ATTORNEY-GENERAL.

*See* CHARITY.

#### ASSIGNEES.

1. Under the Bankrupt Act, prescribing the duties of official assignees, the official assignee is bound by contracts entered into by the creditor's assignees for the sale of the bankrupt's property, such contracts not being in breach of their trust. *Hughes v. Morris*, 636

2. The provision in a contract for the sale of the property of a bankrupt, entered into by the creditors' assignees, that the purchase-money is to be received by the solicitor of the assignees, is not a breach of trust which would induce the Court to refuse specific performance of the contract. *Ib.*

3. The solicitor appointed by the creditors' assignees is the solicitor of all the assignees in the bankruptcy, but he is not, by such appointment, otherwise constituted the agent of the official assignee. *Ib.*

#### AUCTIONEER.

*See* VENDOR AND PURCHASER, 18.

#### CHARITY.

##### BANKRUPT.

*See* ASSIGNEES.

TRUSTEE AND CESTUIQUE TRUST, 1.

##### BIDDINGS.

No order will be made to open biddings, until the report of the purchase has been made. *Lovegrove v. Cooper*, 279

##### BILL.

*See* APPENDIX, p. lxxv.

##### BILL OF DISCOVERY.

*See* APPENDIX, p. lxxv.

##### BOARDERS.

*See* GRAMMAR SCHOOL.

##### CESSER.

*See* LIMITATION OVER.

##### CHARGE.

*See* STATUTES—3 & 4 WILL 4, c. 27.

#### CHARITY.

*See* APPENDIX, p. x.

##### MORTMAIN.

1. If a scheme for the regulation of a charity, settled by a decree, does not operate beneficially for the charity, and the Attorney-General considers that the interests of the charity would, consistently with the foundation, usage and law, be promoted by an alteration of the scheme, it is competent to him to apply to the Court for such alteration; but schemes which have been settled under the directions of the Court ought not to be disturbed upon merely speculative views, or in matters of discretion or regulation, upon which Judges or Attorneys General may differ in opinion, or except upon substantial grounds, and clear evidence, not only that the scheme does not operate beneficially, but that it can, by the alteration, be made to do

so consistently with the object of the foundation. *Attorney-General v. The Bishop of Worcester*, 328

2. A scheme, settled by decree, which might be altered upon information, may be altered upon petition under Sir *S. Romilly's Act* (52 Geo. 3, c. 101), if otherwise a proper subject for such a petition. *Ib.*

3. Although it has been held that a decree of the Court of Chancery confirming the decree of the Commissioners of Charitable Uses is not examinable,—the same being in the nature of a bill of review,—and there cannot be a bill of review upon a bill of review; such an objection does not apply to a proceeding brought to alter the regulations of a charity settled by the decree of the Commissioners and confirmed in Chancery, in a case where no bill of review is necessary. *Ib.*

4. The jurisdiction of the Court as to charities under Sir *S. Romilly's Act*, in cases arising between the trustees and the objects of the trust, may be exercised according to the discretion of the Court, where it can be applied with justice to the parties and benefit to the charity. And, *semble*, the Act may safely be resorted to in cases where the objects of the charity have no distinct interests, and where, therefore, the Attorney-General properly represents them all, and in cases where, though there may be distinct interests, no substantial question of principle can arise between the several objects of the charity. *Ib.*

5. The Attorney-General acts on behalf of the Crown as *parens patriæ*, and represents all the objects of the charity, who are thus, in effect, Plaintiffs through him. *Attorney-General v. The Bishop of Worcester*, 361

6. After a distribution of charity funds for more than two centuries among the poor of certain parishes, an adverse claim on behalf of other parishes to participate in the benefit

of the charity is not properly brought forward by petition under Sir *Samuel Romilly's Act*, but is properly the subject of an information. *In re Magdalen Land Charity, Hastings, and of the 52 Geo. 3, c. 101*, 624

### CLAIM.

*See APPENDIX, pp. x., lxvii.*

1. The Plaintiff in a claim, as in other forms of proceeding, can only recover *secundum allegata et probata*. *Johns v. Mason*, 29

2. The Court will not, under the 13th Order of April, 1850, upon the hearing of a claim, direct further inquiries to be made, or other proceedings to be had, for the purpose of ascertaining the Plaintiff's title to the relief claimed, where such inquiry would, in effect, be recommencing the case, or originating another case. *Ib.*

3. The Court, upon the hearing of a claim, made an order for taking accounts and executing a trust; and *held*, that the pendency of a suit by bill, in which the same accounts and directions would be necessary, and which sought additional relief in respect of alleged breaches of trust, was not a ground for staying the order upon the claim. *Scott v. Lord Hastings*, 35

4. The Orders of the 22nd of April, 1850, relating to claims, were intended to apply to cases where the decree would have been of course in a suit by bill bringing all proper parties before the Court. *Eccles v. Cheyne*, 215

5. The provisions in the General Orders of the 22nd of April, 1850, as to parties, are designed to save the expense of bringing before the Court, at the hearing, in the cases to which claims were intended to apply, persons whose interests are concurrent with those of the plaintiff; and to restore the rule existing in Lord

*Hardwicke's* time, which allowed such parties to be brought in before the Master. *Id.*

6. The Court will not give relief on a claim where the material facts of the case, being in the plaintiff's knowledge, are not stated upon the claim, and the case stated upon the claim is not the case upon which the Court is to adjudicate. *Goode v. West*, 378

7. It is in the discretion of the Court, at the hearing of a claim, to grant or refuse the relief thereby sought, notwithstanding the case may fall within one of the classes referred to in the General Order I. of the 22nd of April, 1850. *Penny v. Penny*, 39

8. Where, by the decree upon the claim of a legatee, it would be necessary to take the accounts of a trade carried on by persons who were not parties to the claim,—of the assets by which it was alleged that the trade had been carried on,—and of the allowances which should be made in remuneration of the persons employed in it who were not parties to the claim, and the claim contained no statement of the facts upon which such accounts and inquiries might depend,—the Court refused to direct inquiries into the facts necessary to be shewn in order to sustain the claim, but dismissed the claim without costs and without prejudice to a bill. *Id.*

#### COMPENSATION.

*See* VENDOR AND PURCHASER, 7, 8.

#### COMPROMISE.

*See* SPECIFIC PERFORMANCE, 1, 2.

#### CONSIDERATION.

1. The cases in which collaterals are not within the consideration of a marriage settlement, proceed upon the ground that the wife cannot be considered to stipulate on the part of the

#### CONSTRUCTION.

relations of the husband; but limitations in favour of collaterals are supported, if there be any party to the settlement who purchases on their behalf. *Heap v. Tonge*, 104

2. The non-payment and probable loss of a cheque on his bankers, which *A.* had signed and delivered to *B.*, is not a consideration to support a promise by *A.* to give a new cheque for the same amount to *C.*, to whom it was alleged that *B.* had sent the lost cheque. *Johns v. Mason*, 29

#### CONSTRUCTION.

*See* ALIENATION.

ANNUITY.

DEVISE.

RELEASE.

1. The Court cannot impute to the legislature, in passing statutes confirming titles created by means of parliamentary powers, ignorance of the transactions which had taken place in exercise of such powers. *Beaden v. King*, 522

2. Bequest of all the testator's Great Western Railway shares, and all other the railway shares of which he might be possessed at the time of his decease,—*held* to pass Great Western Railway shares which he had at the date of his will, and which were afterwards, by a resolution of the Company made under the authority of an Act of Parliament, converted into Consolidated Stock; but *held* not to pass Consolidated Stock in the same Company purchased by the testator after the date of his will. *Oakes v. Oakes*, 666

3. Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains: Shares under a settlement being held not to be vested, might



### CONTINGENT OR VESTED INTEREST.

A gift of residuary estate to *A.*, and such of the children of *B.* as should be living at the death of *C.*, their respective heirs, executors, &c., in equal shares, as tenants in common, and not as joint tenants; but if any such children should die under twenty-one, their shares to be in trust for the survivor or survivors, and other or others of them the said children of *B.* and the said *A.* living at the decease of *C.*, and his and their respective heirs, executors, &c., in equal shares, as tenants in common, and not as joint tenants, so and in such manner that the children of *B.* attaining twenty-one and surviving *C.* and the said *A.*, in case *A.* survive *C.*, should take equally per capita:—*Held*, that *A.*, surviving the testator and dying in the lifetime of *C.*, took, nevertheless, with the children of *B.* who survived *C.*, a vested share in the residuary estate. *Falkner v. Grace*, 282

### CONTRACT.

*See* AGREEMENT.

### CONVERSION.

1. By a marriage settlement freehold estate and some personal estate were conveyed and assigned to trustees, upon trust, on the request of the husband and wife, during their joint lives; and, after the death of either, upon the request of the survivor, to sell the estate, and to stand seised and possessed of the estate until sold, and of the purchase-money, in case the same should be sold, upon trust for the husband for his life; and, after his

decease, upon trust for the wife for her life; and after the death of the survivor of them to convey the estate, unless sold, and assign the personal estate, unto the children and grandchildren of the marriage, born in the lifetime of the husband and wife, as they or the survivor should appoint; and, in default of appointment, unto and amongst the children of the marriage, equally. The estate was taken by the corporation of London under the London Bridge Act (4 Geo. 4, c. 50), and the price having been fixed by a jury, the purchase-money was paid into Court under the Act,—the trustees of the settlement not making out a satisfactory title:—*Held*, that, in the absence of any conveyance by the trustees, the sale must be deemed to have been effected under the Act of Parliament only; and, therefore, that the purchase-money was impressed with the character of real estate under the 35th section of the London Bridge Act. *In the Matter of Taylor's Settlement*, 596

2. That, if there had been any conversion, it must have been by the conjoint operation of the articles and settlement and of the Act of Parliament, but that the settlement and Act of Parliament could not in this case have any conjoint operation. *Ib.*

3. That the estate having been real when settled, it was not meant by the settlement that it should become personal, unless the husband and wife, or the survivor, requested it to be sold. *Ib.*

4. That the words of request should not be construed as merely intended to enforce on the trustees the obligation of sale, but as inserted for the purpose either of enforcing obligation or giving discretion, as the context of the instrument might require. *Ib.*

5. That the payment of money into Court, owing to an objection to the title, and the application of the trus-

tees and tenants for life for the dividends, did not tend to connect the sale with the trust, but led to a contrary conclusion, inasmuch as the City of London, having the power to require a perfect title under their Act, would not be likely to prefer an imperfect one under the trust. *Ib.*

6. That there could be no sale pursuant to the trust without a conveyance of the estate by the trustees, and the payment of the purchase-money to them; and if, after the fixing of the price by a jury, there had been a conveyance by the trustees, at the request of the tenant for life, the Court would have held the sale to have been under the trust:—*Sembla.* *Ib.*

### COPYHOLD.

1. Form of order appointing a new trustee of a copyhold estate, and appointing a person to complete the assurance of the estate to such new trustee. *In the Matter of Hey's Will, and of the Trustee Act, 1850,* 221

2. Devise of a copyhold to such uses as *A.* and *B.*, or the survivor of them, or the executors or administrators of the survivor, or the trustees or trustee of the will for the time being, should by deed appoint; and, subject thereto, to the use of *A.* and *B.*, their heirs and assigns for ever, with a direction to sell and stand possessed of the proceeds upon certain trusts. After the death of the testator, *A.* and *B.* sold the copyhold estate, in pursuance of the trusts. The lord of the manor required that *A.* and *B.*, the devisees, should be admitted, before the admission of the purchaser. On the bill by *A.* and *B.*, the vendors, against the purchaser, to compel a specific performance of the contract, the Court held, that the copyhold tenant might direct the lord to admit into the tenancy either such person as *A.* should nominate, or *A.* himself; that it was the exercise of the right

of the tenant to nominate alternately in favour of *A.* or the nominee of *A.*, and not a double exercise of his right to nominate, first, in favour of *A.*, and then in favour of the nominee of *A.*; and that the purchaser was bound specifically to perform the contract. *Glass v. Richardson,* 698

### COSTS.

1. A party becoming trustee under a deed creating interests adverse to interests already existing, may be liable to costs in a suit instituted to enforce such pre-existing interests in the trust property. *Heap v. Tonge,* 105

2. The costs incurred by a tenant for life, in making out the title to property taken by the Commissioners of Woods &c., under the Metropolitan Improvement Acts, are not, upon the construction of section 49 of the Act 3 & 4 Vict. c. 87, within the description of "expenses of the purchases," payable by the Commissioners. *In re Strachan's Estate, and of the Metropolitan Improvements Acts, 185*

3. The Court has no jurisdiction, under the Metropolitan Improvement Acts, to apportion the costs of a tenant for life in making out his title to property taken under those Acts between such tenant for life and the parties entitled in remainder, or to order payment of such costs out of the corpus of the purchase-money which is paid into Court owing to the disability or incapacity of the parties entitled. *Ib.*

4. The rule which allows a solicitor, being also a trustee and a party to a cause, to charge full costs, where he acts in the suit for a body of trustees, of which he himself is one, does not apply to the case of a solicitor being a trustee and acting as solicitor for himself and his co-trustees in the administration of the trust estate out of Court. *Lincoln v. Windsor,* 158

5. A mortgagee, after filing a foreclosure bill, unsuccessfully moving for a receiver, and rendering himself liable to the costs of the motion, died, and his executors, without reviving the suit, filed a new bill for foreclosure of the same estate: *Held*, that the Defendants, not by plea to the new bill insisting upon the former suit, but claiming by their answers the benefit of the objection as if they had pleaded it,—the Court would not refuse the decree in the second suit, or stay the proceedings therein until the former costs should be paid. *Long v. Storie*, 542

6. But the Court, not approving of the course taken by the Plaintiffs, will give them no costs of the second suit, unless they submit to pay the costs to which the mortgagee was liable in the first suit. *Ib.*

COURT OF LAW.

A question of general law, arising out of circumstances which are likely to occur in other cases, and the decision of which might affect the rights of other persons, is a case in which this Court may properly seek the opinion of a Court of law. *The Manchester, Sheffield, and Lincolnshire Railway Company v. The Great Northern Railway Company*, 284

COVENANT.

Covenants to repair after notice considered as distinct covenants. *Gregory v. Wilson*, 690

CREDITOR'S SUIT.

See ADMINISTRATION SUIT.  
APPENDIX, p. lxvii.

DEBTOR AND CREDITOR.

See SET OFF.

DECREE

See APPENDIX, p. lxvii.

DEED.

See APPENDIX, pp. xi, lxviii.

DEPOSITIONS.

See APPENDIX, p. lxviii.

DEVISAVIT VEL NON.

See HEIR-AT-LAW.

DEVISE

See COPYHOLD.

1. A will, made after the Wills Act 1 Vict. c. 26, whereby the testator gave, devised, and bequeathed all his estate and effects, whatsoever and wheresoever, and of what nature or kind soever, to A., to be paid, assigned, or transferred to him on his attaining twenty-one:—*Held*, to pass real estate (copyhold of inheritance) subsequently acquired, notwithstanding a direction in the will, that, in the meantime, the executors should apply the interest, dividends, and proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as they should think necessary, in the maintenance, education, and putting forth of A. in the world, and should invest the said estate and effects on real or personal security at their discretion. *Stokes v. Salomons*, 75

2. The directions applicable only to personal estate may, in such a case, be construed as referring not to the whole subject-matter of the gift, but to such portions of the estate as may consist of personalty, to which such directions may be fitly applied. *Ib.*

3. The words, "I bequeath to my sons, A. and B., and likewise constitute and ordain them my sole executors of this my will, all and singular my lands, messuages, and tenements, with all my goods and chattels, by them freely to be possessed and enjoyed"—*held*, not to be a devise in fee. *Bromitt v. Moor*, 378

4. A residuary devise of all the

testator's estate, personal and real, although made subject to the payment of his debts, passes the legal estate in premises of which the testator was mortgagee in fee, notwithstanding the case of *Silvester v. Jarman*. *In re John Field's Mortgage, and of the Trustee Act, 1850*, 414

5. Devise and bequest of real and personal estate to trustees, upon trust for the testator's daughter, for her life, (with power of sale on her consent), and, after her decease, for such person or persons as his daughter should by will appoint; and, in default of such appointment, a devise and bequest of such real and personal estate to the testator's heirs and assigns ex parte maternâ, as if he had died intestate; and power (by a codicil) to sink any part of the personal estate, or proceeds of the sale of the real estate, in the purchase of an annuity for the daughter:—*Held*, upon a claim of the daughter against the trustees for the conveyance of the real estate to her, that the heir ex parte maternâ was the heir at the death of the testator, and that the daughter was such heir; and the Court directed a conveyance to her accordingly. *Raoulson v. Wass*, 673

#### DIRECTION FOR SERVICE OF DECREE OR ORDER.

See APPENDIX, p. xiii.

#### DISCOVERY.

See PRIVILEGED COMMUNICATIONS.

#### DISMISSAL OF BILL.

See APPENDIX, p. xiv.

#### EQUITABLE MORTGAGE.

See MORTGAGOR AND MORTGAGEE, 2.

#### EVIDENCE.

See APPENDIX, pp. xvi, lxx.

#### PARTNERSHIP.

1. Evidence of timber having been left standing for ornament. *Marker v. Marker*, 21

2. An affidavit, purporting to be sworn before a Master Extraordinary of the Court of Chancery in *Ireland*, is, under the stat. 14 & 15 Vict. c. 99, s. 10, admissible in evidence in a matter before this Court, without proof of the signature or official character of the person before whom it is stated to have been sworn. *In the Matter of Mahon's Trust*, 459

3. The stat. 14 & 15 Vict. c. 99, enabling parties to a cause to be examined as witnesses, renders unnecessary the common order under the old practice, giving liberty to a party to examine another party, saving just exceptions. *Swann v. Wortley*, 460

4. Case in which a party in a cause, heard upon bill and answer without replication, producing letters of administration to a deceased person,—the Court may admit them, to ascertain the representative character of such party, and may act upon the evidence which they furnish of that character. *Wilkinson v. Fowkes*, 592

5. Case in which, after parties have gone into evidence in an original suit, evidence is material or admissible in a supplemental suit. *Id.*

#### EXAMINATION DE BENE ESSE

See APPENDIX, p. xxii.

On the application for a commission for the examination de bene esse of a witness above seventy years of age (such witness being the Plaintiff in the cause and a Defendant in a cross cause, whose time for answering had expired, and whose answer had not been put in, and being also the party who applied for the commission for the purpose of being examined in support of his own case, under the stat. 14 & 15 Vict. c. 99), the Court refused to impose it as a condition in

making the order, that the answer should be filed. *Forbes v. Forbes*, 461

# EXAMINATION OF WITNESSES ORALLY AT THE HEARING.—See APPENDIX, p. xxii.

## EXAMINER.

See APPENDIX, p. lxxv.

## EXCHANGE.

See STATUTES—1 & 2 GEO. 4, c. 92.

## EXECUTOR.

See PARTNERSHIP, 1, 3.

## FAITH AND CONFIDENCE.

See INJUNCTION.

1. Relief, on the principle of correcting abuses of confidence, given against the liability of the maker of a promissory note, taken from a poor patient on the occasion of a change in his position in life, by his medical attendant, without any account having been rendered, and for an amount beyond what was due for his attendance, on the most extravagant scale of charges. *Billage v. Southee*, 534

2. If the right to a benefit taken by a person in a confidential situation be questioned in equity, and it is sought to be sustained as an exercise of liberality, it must be shewn that it was the intention of the party from whom the benefit emanated to be liberal; but intention imports knowledge, and liberality imports the absence of influence, and the onus of establishing a gift in such circumstances rests with the party who has received it. *Ib.*

3. The bill sought to restrain the Defendant from proceeding to recover the amount of a promissory note for \$25<sup>l</sup>., on two grounds: first, that the Plaintiff had signed it in the belief that it was for 25<sup>l</sup>. only; and second-

ly, that it was given by the Plaintiff, the patient, to his medical attendant, on the occasion of an accession of fortune to the family of the patient, without any account delivered, and for an amount more than would be due for medical attendance, on the most extravagant scale of charges; and the Court, on proof of the circumstances constituting the second ground of relief—*Held*, that the Plaintiff was entitled to a declaration that the note should stand as a security only for the amount due for medical attendance on the Plaintiff, although the case of the Plaintiff as to the first ground of relief sought by his bill was wholly disproved. *Ib.*

4. The Plaintiff in equity having an equitable as well as a legal defence to the action on the note, and having filed his bill, is not bound to go into evidence at the trial at law to establish his legal defence, but may rely on his case in equity. *Ib.*

## FAMILY.

A bequest to the family of *G.*, held not to be void for uncertainty; but construed to be a gift to the children of *G.*, (an uncle of the testator, known to and on terms of intimacy with him,) as joint tenants, and not to include the parents or their grandchildren. *Gregory v. Smith*, 708

## FAMILY CONTRACT.

1. A deed conveying the property of an intestate, upon trusts, in pursuance of an agreement for the division of such property, made soon after the death of the intestate, between his sister and heiress-at-law, her husband, and her illegitimate son, and which agreement was founded on the supposition that the intestate had made a will disposing of his property in favour of the illegitimate son, which will had not been found:

—*Held*, not to be voluntary within the statute of Elizabeth; but supported and enforced against the heiress-at-law and her husband, and also against subsequent purchasers from them for valuable consideration with notice of the trust deed. *Heap v. Tonge*, 90

2. Under the agreement and trust deed, other children of the sister and heiress-at-law, both legitimate and illegitimate, besides the child in whose favour it was suggested that a will might have been made, took interests in the property of the intestate; and it was held, that the deed was not voluntary as to such other parties, but that they were within the consideration of the family contract. *Ib.*

3. Power of the parties to a family arrangement, stipulating for the interests of other members of the family, afterwards to modify the terms of the arrangement. *S. C.*, 103

## FINES ON RENEWAL.

### *See* RENEWAL OF LEASE.

Where leases, which the testator had directed to be renewed, were renewed by adding a *cestui que vie*, by means of a payment out of funds belonging to the testator's estate (not charged with such renewal), and it was referred to the Master to inquire what security the tenant for life of the leases ought to give, and to what amount, for the contribution which he might be liable to make for the benefit he should derive from the renewal, the Master found, and the Court had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid, in the name of the trustees, on the life of the new *cestui que vie*, the costs and premiums in respect of which ought to be paid out of the rents and

profits of the estate to which the tenant for life was entitled. *Hudleston v. Whelpdale*, 775

2. The Court subsequently declared the policy of life insurance to be a security for the benefit which the tenant for life had derived, or might derive, from the renewal, or might have derived therefrom if another proper life had been inserted in lieu of his own. *Ib.*

3. But, *semble*, the mode of providing the security adopted by the report is erroneous in principle: for the object of the Court, in requiring security to be given by the tenant for life in respect of the benefit which he may derive from the renewal of the lease, is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive; and the security therefore is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of; and this sum (which would be payable on the death of the tenant for life) is not properly secured by a policy of insurance on the life of another person, inasmuch as it throws upon the remainderman not merely the interest of the capital provided, but the burthen of keeping up a policy of life insurance for the full amount; and it is mere speculation whether this burthen will be compensated by giving him the benefit of a policy at a less rate of premium, owing to an earlier insurance of the life. *Ib.*

4. Although it may be, that, when provision is made of a fund for renewal, the remainderman will not suffer, this is not the principle, for the principle is, that the remainderman ought to bear so much of the capital paid for renewal as may not be paid by the tenant for life under the security which he has given. *Ib.*

5. The Court will not retain the

income of the tenant for life, because he may become liable to give security for the payments on account of renewals, before the occasion for giving such security has arisen. *Ib.*

## FORECLOSURE.

See APPENDIX, p. xxvi.

1. A party to a suit in which a decree of foreclosure has been made, in the absence of another party interested in the estate, whose interest was not disclosed on the pleadings, is, notwithstanding the imperfection of the suit, bound by the decree of foreclosure. *Bromitt v. Moor*, 374

2. A party to a foreclosure suit, whose interest is thereby foreclosed, and who afterwards becomes entitled to an interest in the same estate by devise or otherwise, from another person who was not a party to the foreclosure, may bring his bill of redemption. *Ib.*

3. Relief will not be given in such a case, on a claim for redemption, stating only that the Plaintiff is entitled to the equity of redemption under certain instruments, but not stating any of the proceedings in the suit for foreclosure, or the grounds on which the Plaintiff seeks to set it aside. *Ib.*

4. Decree for foreclosure upon an original claim on further directions, and on the hearing of a supplemental claim, where the existence of an incumbrance subsequent to that of the Plaintiff was found by the Master, and the subsequent incumbrancer was brought before the Court by the supplemental claim. *Robinson v. Turner*, 488

## FOREIGNERS.

See PATENT, 2.

If, in any case, the rights of fo-

reigners out of their own country are governed by their own laws, it is not by force of those laws themselves, but by the law of the country in which they may be adopting those laws as part of their own law for the purpose of regulating such rights. *Caldwell v. Vanolissengen*, 425

## FRAUD.

See APPOINTMENT.

FAITH AND CONFIDENCE.

JOINT-STOCK COMPANY.

LAND TAX REDEMPTION, 4.

1. Circumstances in which insurance companies preparing and issuing policies not in conformity with the agreement upon which the insurance was accepted, may be liable in equity on the ground of fraud. *Collett v. Morrison*, 176

2. A purchase obtained by fraud would be, in effect, no purchase, and could not acquire any validity by the confirming statutes. *Beaden v. King*, 523

## FREE SCHOOL.

The term "free school" is flexible in its meaning, and must be construed according to the context and usage. It has no reference to the instruction given, but to the terms on which it is given. *Att.-Gen. v. Bishop of Worcester*, 358

## GENERAL ORDERS.

XXXII. OF AUGUST, 1841.

See PARTIES.

XLIV. OF AUGUST, 1841.

Since the General Order XLIV. of August, 1841, which directs that the decree against a Defendant, who makes default at the hearing, shall be absolute in the first instance, without giving him a day to shew cause, the

practice has been, notwithstanding the default of the Defendant, to hear the cause, and make such a decree as the Plaintiff upon the pleadings and evidence is entitled to, and not as theretofore to allow the Plaintiff to take such a decree as he can abide by. *Hakenwell v. Webber*, 541

I. OF 22ND APRIL, 1850.  
XIII. OF 22ND APRIL, 1850.

See CLAIM.

### GRAMMAR SCHOOL.

1. There is no general rule against the admission of boarders in grammar schools; but the number of boarders admitted ought not to be such as in any manner to affect the admission of free boys, or the means of educating them to the best advantage, according to the provisions of the scheme. *Att.-Gen. v. Bishop of Worcester*, 328

2. Although there be reason to suspect that a school was in connexion with the Church of *England*, in the absence of any positive evidence confining the benefit of the charity to members of the Church of *England*,—the usage having been to admit the children of dissenters to the benefits of the school,—the question of their admissibility must be governed by usage. *Ib.*

3. The foundation of a school in or before the 17th century, for the instruction of children and youth in good literature and learning, goes far to shew that it was intended for instruction in the learned languages. *S. C.*, 359

4. Evidence on which the Court concluded that a school was a grammar school within the jurisdiction of the Court under Sir *Eardley Wilmo's Act*. *Ib.*

5. Distinction between schools endowed for the education of children

### HEIR-AT-LAW.

and youth in a certain town, in which the inhabitants might therefore take as boarders boys resorting to the place for their education, and schools endowed for the education of boys born in the town in which the school is situated. *S. C.*, 363

6. If, on the one side, there may be evils, there are on the other great advantages resulting from the admixture of children of the upper and lower classes in the same school. *S. C.*, 365

7. The question is, not whether a competent master of a grammar school can be provided for a given income, but by what means the services of a superior master can be secured; and there is no rule that the Court will exclude boarders in all cases where the income of the charity is sufficient for the maintenance of the master. *Ib.*

### GRANDSON.

The fact, that, wherever a limitation occurred in the will in favour of sons, it was accompanied by the provision that they should take in order of primogeniture, and that there was no such provision as to grandsons—*Held* to indicate that the sons were intended to take by particular description, and the grandsons as a class. *East v. Twyford*, 713

### GUARDIAN AD LITEM.

See APPENDIX, pp. xxvi., lxxvi.

A guardian ad litem to a Defendant shewn by affidavit to be a lunatic, but not so found by inquisition, appointed without a commission. *Piddocks v. Smith*, 395

### HEIR-AT-LAW.

See DEVISE.

1. In a creditor's suit, seeking the



application of real estate in the payment of debts, both the heir-at-law and devisees of the debtor being parties, and the will not being admitted by the heir,—the Court would neither dismiss the bill against the heir, nor direct an issue devisavit vel non at his request,—the right of the creditors being paramount. *Spickernell v. Hotham*, 73

2. "Inherit" construed in the sense of succession by descent. *East v. Twyford*, 729

## HUSBAND AND WIFE.

## See APPOINTMENT.

1. The obligation imposed upon a husband, suing for the property of his wife, of doing equity by making a settlement, is not enforced by the Court upon the bill being filed, nor upon the decree being made, where the interest is in reversion, (for the Court only deals with the interest in possession); but the obligation is enforced when the property comes to be distributed. *Osborn v. Morgan*, 432

2. On the principle that marriage is a gift of the personal property of the wife to the husband, there is no distinction between property to which the wife is entitled in equity and property to which she is entitled at law. *Ib.*

3. The wife's equity for a settlement does not depend on any right of property in her, but rests on the control which Courts of equity exercise over property falling under their dominion. *Ib.*

4. The right to a settlement is an obligation which the Court fastens, not upon the property, but upon the right to receive it. *Ib.*

5. Origin of the wife's equity for a settlement. *S. C.*, 434

6. The Court cannot take the consent of the wife to part with her reversionary interest. *Ib.*

7. The consent of the wife taken in a Court of equity to part with her interest in property about to be distributed, is not analogous to a fine at law with respect to real estate. *S. C.*, 435

8. A Court of equity will not lend itself as an instrument to enable a husband to acquire a right in his wife's property, which he has no means of acquiring at law. *Ib.*

9. If a wife thinks proper to keep up an establishment against the wishes of the husband, what is supplied for the establishment will be a consideration for payments out of her estate on that account. *Hughes v. Wells*, 749

10. That the proceeds of the settled funds having been placed to the wife's account at her bankers, and applied principally to the current expenses of the establishment of her husband and herself, by the order and direction of the wife, the husband being the agent in their application as to monies so applied, there was a defective appointment, which ought to be aided by the Court. *Ib.*

11. If the husband have not in any degree influenced the acts or conduct of the wife, there is no reason why (the wife having been constituted a feme sole by the settlement,) her assets, including the trust funds which have become her assets by the exercise of her power, should not be bound to the same extent as the assets of any other person, not under the disability of coverture, would be bound in the same circumstances. *Ib.*

12. The rights of married women may be barred, and their estates affected, by active participation in breaches of trust, and if—their powers having been exercised by will—the trust funds become their assets, they must be liable for those breaches of trust, *semble*. But the fact of a married woman having permitted her

husband to receive the trust funds does not preclude a right to relief by her or her appointee, for that would be to defeat the purpose for which the trust was created—the protection of the wife against the husband. *Ib.*

### IMPLICATION.

A marriage settlement declared the trusts of a sum of stock to be, that, during the joint lives of the husband and wife, the dividends should be paid to the wife for her separate use; and if she should die in the husband's lifetime, the principal sum should be transferred to him absolutely; and if the husband should die in the wife's lifetime, then the same should be held in trust for such person as the wife should by will appoint. The wife survived the husband:—*Held*, that the wife took, by implication, a life-interest in the trust-fund. *Allin v. Cranshaw*, 382

### INDORSEMENT ON BILL OR CLAIM.

*See* APPENDIX, p. xxvii.

### INFANT.

*See* ACQUIESCENCE, 1.  
NEXT FRIEND.

### INFORMATIONS.

The Court disapproves of charity informations got up by public meetings, and supported by public subscriptions. *Attorney-General v. Bishop of Worcester*, 369

### INJUNCTION.

*See* JOINT-STOCK COMPANY, 2.  
PATENT, 5.  
WASTE, 1, 3.

1. An injunction granted to restrain the use of a secret in the compounding of a medicine, not being the subject of a patent, and to re-

strain the sale of such medicine by a Defendant, who acquired a knowledge of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. *Morison v. Moat*, 241

2. A Plaintiff, not having the privileges of a patentee, may have no title to be protected in the exclusive manufacture and sale of a medicine against the world; but he may, notwithstanding, have a good title to protection against the particular Defendant. *Ib.*

3. The case of a secret acquired by a breach of faith or confidence, but communicated to a purchaser for value, without notice of any obligation affecting it, distinguished from that of a party whose claim of right to use the secret is that of a volunteer. *Ib.*

4. The Court, in interfering in such cases upon the ground of faith or confidence, fastens upon the conscience of the party, and enforces the obligation against him, as it enforces, against a party to whom a benefit is given, an obligation to perform a promise upon the faith of which the benefit has been conferred—*Semble. Ib.*

5. The injunction restrained the sale of medicine by the Defendant under the name of the medicine prepared according to the secret prescription, not on the ground of the use of the name alone, but because it was by the use of the name that the Defendant was availing himself of the breach of faith and contract. Whether, apart from that ground of interference, the Court would have restrained the use of the name before the Plaintiff's right had been established at law—*Quære. Ib.*

6. On a bill to restrain the exercise of a legal right, it is the duty of the Plaintiff to satisfy the Court that there are substantial grounds for

doubting the existence of the legal right. *Sparrow v. The Oxford, Worcester, and Wolverhampton Railway Company*, 441

7. Although the Court has power to restrain parties from using a building which has been erected in a form that is in violation of the terms of a contract or of an Act of Parliament, yet a small excess in the height of a building beyond that to which it might lawfully have been raised, where no irreparable injury arises from such excess in height, would not be a case in which the Court would interfere by interlocutory injunction to restrain the use of the building after it had been erected. *The Warden &c. of Dover Harbour v. The South Eastern Railway Company*, 493

#### INJUNCTION TO STAY PROCEEDINGS AT LAW.

See APPENDIX, pp. xxix, lxxvi.

#### INSPECTION OF DOCUMENTS.

See APPENDIX, p. lxxvi.

#### INTERPLEADER.

In an interpleader suit, to determine the right of conflicting claimants to portions of an aggregate fund, the Court directed inquiries as to the claims of the several Defendants, and reserved further directions and costs. One Defendant obtained a separate report finding his title to a portion of the fund, and, being unable to set down the cause on further directions, in consequence of the claimants of the other portions of the fund not having proceeded to establish their title, he presented his petition for payment of the sum found due to him: but the Court refused to order such payment upon petition, or until the cause was heard on further directions, and the costs of the suit could be disposed of. *Bruce v. Elwin*, 294

#### INTERROGATORIES.

See APPENDIX, pp. xxix, lxxvii.

#### ISSUE.

See APPENDIX, p. xxx.

#### JOINT-STOCK COMPANY.

1. After the creation of the original shares in a Railway Company, a further capital was raised in half shares, upon which a resolution of the directors guaranteed interest at 6l. per cent. for ten years. On a motion by a holder of original shares, to restrain the Company from paying any interest or dividends on the half shares out of the profits of capital subsequently created, in preference to the interest or dividends on the original shares, and from paying any preferential interest or dividends on the half shares, while any of the floating or unsecured debt of the Company was unpaid, except out of the clear profits of the current half-year—the Company entered into an undertaking not to make such payments, unless under the authority of Parliament, until the hearing or further order. By a subsequent Act of Parliament it was enacted, that it should be lawful for the Company to commute the guarantee attached to the half shares into any other guarantee or privilege, perpetual or terminable, which should be agreed upon by four-fifths of the shareholders of the Company at meetings, after notice, as therein mentioned. The directors thereupon proposed to commute the guarantee into an annual payment for each half share in perpetuity. Upon a motion to restrain the Company from in any manner acting on or giving effect to the proposed scheme for the commutation of the guarantee, or from declaring or paying any commuted or other dividend on the original or half shares,

while any of the unsecured debt remained due, and except out of the clear profits of the current half-year, and so far as such profits should be sufficient after payment of such debt, and, upon a cross-motion, to discharge the undertaking:—*Held*, that the Act of Parliament authorising the commutation did not take the case out of the undertaking; and that, therefore, the undertaking was binding until the hearing of the cause, or the further order of the Court. *Stevens v. The South Devon Railway Co.*, 313

2. *Held* also, that the undertaking was not an agreement which bound the Defendants to do nothing in the matter, the subject of the injunction, except under the order of the Court, or unless the Court should be of opinion that what they proposed to do was proper to be done; but was in the nature of an injunction obtained without argument, and which the Defendants might apply to discharge. *Ib.*

3. That, upon the construction of the resolution, the holders of half shares were entitled to the guaranteed 6l. per cent. out of any funds of the Company which could be lawfully so applied, and therefore out of future profits, before any dividend could be payable upon the whole shares. *Ib.*

4. That, independently of the construction of the resolution, the Act of Parliament having authorised a commutation of the guarantee, and the commutation having received the consent required by the Act, the Company might lawfully carry it into effect. *Ib.*

5. That the principles which apply to partnerships composed of a limited number of persons, apply to such Companies; and that the majority of the partners in a partnership of a limited number, constituted with similar provisions as to profits, could overrule the minority, upon the question, whether profits should be di-

vided while debts of the partnership were unprovided for. *Ib.*

6. That the manner in which profits were to be ascertained and divided was a question of internal management, and within the power of the Company to direct. *Ib.*

7. Bill by one of the shareholders of the Eastern Archipelago Company, which was incorporated by charter, alleging that the public purposes of the grantors of the lands and mines which the Company held, and in furtherance of which the Plaintiff had subscribed for shares, had not been fulfilled; and that such grants had been diverted in a great degree to private objects; and that the charter had been granted by the Crown on condition that a moiety of the capital should be subscribed for, and a fourth thereof paid up within a limited time, which condition also had not been fulfilled; and that, having failed to fulfil such intentions and conditions, it was a fraud on the part of the directors to certify that they had been performed, and to commence the business of the Company and make calls, as they had done; and praying repayment of such calls, an injunction to restrain the directors from making calls and carrying on business for the future, and an indemnity to the Plaintiff. The Company and directors demurred to the bill, and the demurrer was allowed. *Macbride v. Lindsey*, 574

8. A party becoming a member of a public company or corporation upon false representations, made not to him alone, but to him and other members, cannot be entitled, on that ground, to any decree for the repayment of his subscriptions, to which the other members would not be equally entitled; and if he be entitled to such repayment, he cannot obtain that relief in the absence of the other members. *Ib.*

9. It is no ground for relief in equity at the suit of a shareholder against the Company, that the charter from the Crown or the grant to the Company from a private person has been obtained by misrepresentation to the Crown or to such grantor. It is for the Crown or the grantor, if either should complain of the fraud and misrepresentation, to take proceedings to set aside the charter or the grant. *Ib.*

10. The provision, that the business of the Company should commence from the date of the certificate of the directors that a stipulated number of shares had been subscribed for and the stipulated capital paid up,—*held* not to mean that the Company was not to exist antecedently to that date,—where the deed also provided that the parties were to be associated, the business to be carried on, and the directors to have power to act for the Company, notwithstanding the full number of shares were not subscribed for. *Ib.*

11. The averment in the bill, that the Defendants alleged that the other shareholders had concurred (or the admission of the Defendants, the directors, that the other shareholders had concurred), in the prosecution of the business of the Company, notwithstanding the terms of the charter were not satisfied, does not afford ground for a decree which might prejudice the interests of the other shareholders; for the allegations (or admissions) of the Defendants cannot be taken as proof of the conduct, or affect the rights, of such other shareholders. *Ib.*

12. Where it appeared upon the bill that the deed of settlement of the Company was enrolled in Court, and that the Plaintiff had seen the deed, (the bill stating the number of shares which were subscribed for thereupon), the allegation in the

same bill, that the plaintiff was ignorant and unable to discover who the shareholders were, was not, upon demurrer, taken to be a fact; and, in such a case, the Court, weighing one allegation against the other, *held*, that the absence of the other shareholders was not sufficiently accounted for. *Ib.*

13. If a member of a Company has a common interest in the subject of his suit with the other members, he must sue on behalf of himself and all the other partners; and if he has not such common interest, the other partners must be represented on the record, that they may be heard upon the question. *S. C.*, 585

14. Effect of the execution of the deed of settlement by the Plaintiff. *S. C.*, 590

15. A bill, originally commenced by one on behalf of the other shareholders of an abortive Railway Company (except the Defendants), to recover from the provisional directors and secretary monies alleged to have been abstracted from the Company by the fraud of some and negligence of others of the Defendants; and afterwards ordered to be prosecuted by the official manager under the Winding-up Act 11 & 12 Vict. c. 45, s. 53—It appeared that the bill had been filed by the former solicitor of the Company, and that the original Plaintiff had (as stated by the answers, and not denied) been indemnified by such solicitor; and the Court being satisfied, from those and other circumstances, that the suit had its origin in other motives than the benefit of the shareholders, and finding, that it was improperly constituted, and that the bill contained charges which ought not to have been made:—*Held*, that, having regard either to its frame or its merits, it ought not to have been adopted by the official manager; and the bill was dismissed, with costs to be paid by

him. *The Official Manager of the Grand Trunk or Stafford and Peterborough Union Railway Company v. Brodie*, 823

16. A Railway Company, having failed in prosecuting the undertaking, resolved to return the unapplied portion of the deposits to the shareholders rateably; and, on the first instalment being repaid, the original scrip certificates were called in and new certificates issued, to the effect that the holders were entitled to a further pro ratâ division of the balance of the Company's funds; and on payment of the final instalment of the unapplied fund, the new certificates were called in, and the shareholders were required to sign a memorandum, undertaking to release the directors when called upon to do so:—*Held*, that the terms on which the old and new certificates respectively were delivered up constituted new contracts between the shareholders and the directors; that the persons entering into such contracts in ignorance of the frauds which were alleged to have been committed by the directors, would, on proof of such fraud, be entitled wholly to undo such contracts, but not to set them aside partially, by retaining the instalments and getting rid of the agreement to release the directors; that one shareholder, having no right to make an election for the others, between abiding by the new contracts or setting them aside, could not sue on behalf of himself and all other shareholders to recover from the directors more than the amount which was refunded under the contracts. *Ib.*

## JUDGES OF THE COURTS OF COMMON LAW.

See APPENDIX, p. xxx.

## JUDGMENT CREDITOR.

See STATUTES—3 & 4 WILL. 4, c. 27, s. 42.

1. A judgment creditor, who had executed a deed, whereby the real and personal estate of the debtor were conveyed to trustees for the benefit of such of his creditors as should execute the deed, assigned his judgment to such trustees:—*Held*, that the trustees could not be considered as owners of the trust estate, so that the assignment by the judgment creditor would have the effect of merging the judgment. *Squire v. Ford*, 47

2. That the judgment creditor having assigned his judgment to the trustees of a creditors' deed, in trust for the benefit of the creditors who had executed the deed (of whom he was himself one), was entitled to sue on behalf of himself and all such other creditors, for the establishment of their rights in respect of the trust estate and the execution of the trusts. *Ib.*

## JURISDICTION.

See CHARITY, 2, 3, 4.

### SHIP.

1. Whether the Court will enforce against Defendants, having in their hands proceeds of the sale of land situated out of the jurisdiction, the equities to which such proceeds would have been subject if the land had been situated within the jurisdiction, depends upon the question, whether the contract which is sought to be enforced was or was not, by the *lex loci rei sitæ*, capable of being fulfilled. *Waterhouse v. Stansfield*, 234

2. If a contract relating to land situated out of the jurisdiction be one which the *lex loci rei sitæ* renders incapable of fulfilment, the Court will not enforce the contract against the proceeds of a sale of such land coming to the possession of parties

within the jurisdiction, though they take such proceeds bound by the same equities as affected the party to the contract under whom they claim. *Ib.*

3. The rights of the parties interested in the proceeds of the sale of land situated out of the jurisdiction do not cease to be governed by the *lex loci rei sitæ*, by the circumstance of such proceeds being brought in specie within the jurisdiction. *Ib.*

4. A law permitting alienation of land, only upon the terms of the proceeds being applied in a particular manner, is a restraint upon alienation; and restraints upon the alienation of land are always governed by the *lex loci rei sitæ*. *Ib.*

5. Where a summary jurisdiction is created by Parliament, it must be deemed to be the intention of the legislature (in the absence of any restriction) that the proceedings under it, when resorted to, shall have the same force and effect as the proceedings under the ordinary jurisdiction for which it is substituted. *Attorney-General v. Bishop of Worcester*, 328

6. The power of the Court to make alterations, as times and circumstances require, in schemes settled by its decrees for the management of charities, does not depend upon the character in which the decree has been made by the Lord Chancellor. *S. C.*, 356

7. Where a legal right exists, the Court cannot refuse to interfere for its protection, upon grounds which depend exclusively on considerations of national policy. *Caldwell v. Vanvlietssongen*, 415

### LACHES.

*See ACQUIESCENCE.*

### LANDLORD AND TENANT.

1. A new letting to an old tenant, commencing immediately, operates as

a surrender of the original term, because the lessor could have no power to create the new term, if the original term had subsisted; and, for a like reason, a new letting to a third party, with the assent of the original tenant, has the same operation. *M'Donnell v. Pope*, 705

2. The above principle forms the ground of the decision in *Thomas v. Cook* (2 B. & A. 119); and the authority of that case ought not to be carried further than the reason on which it rests. *Ib.*

### LAND-TAX REDEMPTION.

1. The legislature intended, by the Acts for the redemption of the land-tax, to authorise all such sales for that purpose to be made by ecclesiastical persons, with the consent thereby required, as could have been made for any purpose, with the like consent, before the passing of the restraining statutes; and, before the restraining statutes, a sale might have been made from a prebendary in his corporate character to a prebendary in his individual character. *Beaden v. King*, 499

2. An objection to the validity of a sale under the Land-tax Redemption Acts, upon the ground that the lands were not properly saleable, and, apart from any question of fraud, were not properly sold under the Acts, is a legal objection; and there being no impediment to the trial of that question at law, a bill in equity on such a ground cannot be supported. *Ib.*

3. But, the confirming statutes 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, have removed any objection to a sale and conveyance under the Land-tax Redemption Acts, arising from the property so sold not having been originally saleable, or not having been properly sold, within the meaning

and according to the directions of the Acts. *Ib.*

4. If it were shewn that a purchase under the Land-tax Redemption Acts had been effected by fraud, the Court would rectify it, notwithstanding the confirming statutes, for a purchase so effected would not acquire validity from those statutes. *Ib.*

5. The restriction expressed or implied in the words of sect. 25 of the confirming statute 57 Geo. 3, c. 100—"the titles derived under such sales," construed to mean that the Acts were not to operate upon titles anterior to the sales under those Acts, and not to limit the confirmation to the titles of sub-purchasers only. *Ib.*

6. Under the statutes for the redemption of the land-tax, the Lords Commissioners are placed in the position of vendors; and, therefore, if the trustees of a charity should purchase the property of the charity under those Acts, they would not be purchasing from themselves, but from the Lords Commissioners. *Ib.*

7. The confirming statutes 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, remove any objection which might have been raised on the ground of the party selling (under the Acts) being both vendor and purchaser. *Ib.*

### LAPSE OF TIME.

Effect of length of time elapsing between the transactions complained of and the institution of a suit for relief against them, where the fiduciary character on which the title to relief is founded has de facto ceased for a long period, evidence has been lost, and it has become impossible to restore the Defendant to the same position as he would or might have been in, if the suit had been promptly brought. *Beaden v. King*, 532

### LEGACY.

#### LEGACY.

See ANNUITY.

FAMILY.

MARSHALLING.

SERVANT.

SET-OFF.

UNCERTAINTY.

1. A gift to all the grandchildren of the testatrix, "with the exception of one, viz. —" established as a gift to the class, not affected by the incomplete exception. *Illingworth v. Cooke*, 37

2. A bequest of a legacy, upon trust to apply so much of the interest as the trustees should think proper in the maintenance of the testator's grandson until twenty-one; and, upon his attaining that age, to pay the whole of the interest of the legacy to the grandson, for his life; and a direction that, after the decease of the grandson, the trustees were to stand possessed of the legacy and interest, and all accumulations, in trust for the grandson's children, with remainder, in default of such issue, over:—*Held*, that the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, shewed that the interest was intended for him; that the legacy vested in interest (although not in enjoyment,) before the grandson attained twenty-one; and that the grandson was therefore entitled to the interest which accrued during his minority, and was not applied in his maintenance. *In re Rouse's Estate*, 649

3. That the unapplied accumulations accruing during the minority of the grandson did not go with the capital of the legacy, because the disposition of the capital after the grandson attained twenty-one was of the interest and certain specific accumulations, not including the accumulations during the minority. *Ib.*



4. A legacy to a child carries interest, on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of the child out of another fund, the legacy does not necessarily carry interest. *Ib.*

5. Legacies of 1000*l.* each to the three children then living of *A.*, the testator's daughter, with a proviso for the payment of the interest for their maintenance during minority, and a bequest of 2000*l.* to trustees, upon trust for *A.*, for her life; and, from and after her decease, for all and every her children living at her decease, equally to be divided, with a proviso, that, if any one or more of the children of *A.* should die under twenty-one, without leaving issue, the original and accrued legacies and shares bequeathed to the child or children so dying should go to the others and other of the said children, equally; and a declaration, that, if all the children of *A.* should die under twenty-one, and without leaving issue, the legacies of 1000*l.* a piece should not be raiseable; but, from and after the decease of the last surviving child, the said legacies,—and from and after the decease of her daughter, the 2000*l.*,—should sink into the residue:—*Held*, that the rights of the children of *A.* in the legacy of 2000*l.* were contingent upon their surviving their mother. *Farrer v. Barker*, 737

6. Some of the reasons which have influenced the Court in decisions in favour of vesting legacies in children, have no application in the case of grandchildren, where there is nothing to shew that the testator had placed himself in loco parentis. *Ib.*

7. Gift by the testator to his wife, for her life, or until her second marriage, of the interest of his real and

personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself and children; and if she married again, he declared that her power and benefit under his will should cease; and when thirty years were expired, he ordered all his property, both freehold and leasehold, to be sold, and two-thirds to be divided amongst his children living at that period, or to their heirs, and one-third to be invested for the benefit of his wife; and after her decease, he bequeathed such third to his children then living, and to their heirs:—*Held*, that the gift at the end of thirty years was not liable to objection on the ground of remoteness; that there was no substitution of the legatee created by the gift to the children, "or to their heirs," but that the word "or" must be read "and;" and that the children of the testator living at the end of thirty years (who were also the same children as were living at the death of the widow) were entitled to the proceeds of the sale of the estate, and also to the intermediate rents after the death of the widow and before the expiration of the thirty years. *Lachlan v. Reynolds*, 796

## LEGACY DUTY ACT.

See APPENDIX, p. xxx.

## LEGATEE'S SUIT.

See ADMINISTRATION SUIT.

## LESSOR AND LESSEE.

1. The Court refuses to relieve lessees against the legal consequences of breaches of covenant, as well in cases which rest in contract, as where the legal relation between the parties is fully established *Gregory v. Wilson*, 683

2. Neither in cases of accidental neglect to perform the covenants to repair, nor in case of wilful or obstinate breaches of such covenants, will the Court relieve the tenant against the consequences of the breach. *Ib.*

3. A tenant is not absolved from the performance of the covenants of his lease by a notice to quit: such notice ought rather to be regarded as a notice to be more vigilant in the performance of the covenant. *Ib.*

4. The fact of there being no personal representative of a lessee on whom the duty of performing the covenants of the lease has devolved, cannot be set up against the landlord. *Ib.*

5. It must be a strong case of equity created by a landlord against himself to control his legal right. *Ib.*

6. Claim by a lessor for the administration of the estate of his lessee, and to have a sufficient part of the assets impounded to answer future possible breaches of covenant in the lease—dismissed. *King v. Malcott*, 692

7. It is not a part of the contract between a lessor and lessee, that, on the death of the lessee, his assets shall be impounded to answer the future rent and covenants; and if any portion of the assets are retained or appropriated for that purpose, it is from the right of the executor to indemnity, and not from any right which the lessor has to require such security. *Ib.*

8. There is no principle on which a Court of equity should extend the legal right or remedy of the landlord, as against the tenant or his estate. *Ib.*

#### LETTERS OF ADMINISTRATION.

1. A trust fund paid into the Court of Chancery, under the Trustee Relief Act, after the death of the cestui que

trust, ordered to be paid to the administrator of the cestui que trust under a grant of letters of administration by the Archdeaconry Court, obtained after the fund was in the Court of Chancery. *In re the Trust Estate of Elizabeth Spencer*, 410

2. Where a diocesan probate is proper with reference to the situation of the assets at the death, it remains so notwithstanding they may afterwards be rightfully or wrongfully removed out of the diocese. *Ib.*

#### LETTER OF ATTORNEY.

See APPENDIX, p. xxxi.

#### LIFE ESTATE.

1. Bequest of property (monies to be laid out in land) to *L.*, and afterwards to his eldest lawfully begotten son, &c., remainder to others in succession; with a direction, that, in case of the decease of an eldest son, in any of the cases, then the property to go to the second son, and so on according with primogeniture; but in every case a grandson to inherit before a younger son, and before the next named in the entail, or any of his sons:—*Held*, upon the language of the whole will, that the testator did not regard *L.* as the stock or stirps, but looked to the sons of *L.* as the parties from whom the property was to devolve in succession; and that *L.* took an estate for life only. *East v. Twyford*, 713

2. Intention to give life estates to persons not born in the lifetime of the testator aided, so far as the law will allow, by the cy-pres doctrine. *S. C.*, 729

#### LIFE INSURANCE.

See ACCUMULATION.

#### FINES ON RENEWAL.

1. The stat. 14 Geo. 3, c. 48, does not prohibit a policy of life insurance

## MARSHALLING.

from being granted to one person in trust for another, where the names of both persons appear upon the face of the instrument; nor does the effecting of such an insurance in any way contravene the policy of the statute. *Collett v. Morrison*, 162

2. An insurance Company, having had the chance of a contract of life insurance turning out in their favour, cannot afterwards be permitted, on the ground of the inconsistency of the contract with their rules, to escape from it. *Ib.*

## LIMITATION OVER.

*See ALIENATION.*

1. There is no rule that a life interest may not be well determined by a proviso for ceaser, although it be not accompanied by any limitation over—*Sembla. Rochford v. Hackman*, 481

2. No greater effect can be given to a limitation over than to an express declaration that the life interest shall cease. *Ib.*

## LUNATIC.

*See GUARDIAN AD LITEM.*

## MAINTENANCE.

*See LEGACY*, 2, 4, 5.

## MANAGING OWNERS.

*See SHIP.*

## MARSHALLING.

1. The rule,—where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both,—that the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate to those who have no other fund, applies equally to the case

## MORTGAGOR &c. 867

where one of the legacies only is charged upon real estate. *Scales v. Collins*, 656

2. The Court does not construe a charge upon real estate of one only of several legacies if the personal estate should not be sufficient, as intended for the exclusive benefit of that legatee, but construes the intention of the testator to be, that all his legacies shall be paid; and therefore that the charge is to take effect if the personal estate be insufficient for the payment of all the legacies. *Ib.*

## MISJOINDER.

1. Where several plaintiffs beneficially interested in a trust fund sue the trustees in respect of a breach of trust, and one of such plaintiffs has, in addition to his character as a cestui que trust, become the personal representative of a deceased trustee, who was primarily, or with the other trustees jointly, liable, the suit is improperly framed, and cannot be sustained, notwithstanding it be averred by the bill that the plaintiff has received no assets of the estate of the deceased trustee, and that the trustee died insolvent. *Griffith v. Vanheythuysen*, 85

2. Whether, if the plaintiff, who, in such a case, had become the representative of the accounting party, were the sole plaintiff in the suit, the objection to the suit could be maintained—*Quere.* *Ib.*

## MORTGAGOR AND MORTGAGEE.

*See STATUTES*—13 & 14 VICT. c. 60. USURY.

1. A mortgagee of a reversionary interest in stock filing a bill to realise his security, is entitled to a decree for foreclosure in default of payment, that being the ordinary method where—

by the Court excludes the right of redemption; and although he may, in some cases, be entitled to a decree for sale, there is no rule or practice of the Court which compels him to submit to such a decree. *Wayne v. Hanham*, 62

2. At the hearing of a claim for foreclosure, option will be given to the Plaintiff to take either the common order for foreclosure, or an inquiry as to other incumbrances, suspending the order for foreclosure until after the report. *Robinson v. Turner*, 129

3. A legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title deeds, unless there be fraud, or gross or wilful negligence on his part; and the Court will not impute fraud or gross or wilful negligence to the legal mortgagee, if he has bona fide inquired for the deeds, and a reasonable excuse has been given for not delivering them to him; but the Court will impute fraud or gross or wilful negligence to the mortgagee, if he omits all inquiry as to the deeds. *Hewitt v. Loosemore*, 449

4. Where a mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction, although the mortgagor, acting as such solicitor, is not paid by the mortgagee; for the nature of the transaction is, that all expenses are borne by the mortgagor. *Ib.*

5. It does not necessarily follow in such a case, because the mortgagor is the solicitor of the mortgagee, that, therefore, the mortgagee has constructive notice of facts connected with the title which are known to the mortgagor. *Ib.*

6. Decree for foreclosure against divers sub-mortgagees and parties

## NEXT FRIEND.

having derivative interests under the mortgagor subsequent to the Plaintiff, without any inquiry as to their respective priorities. *Long v. Storie*, 551

7. Mortgagee purchasing an equity of redemption, preserves his mortgage unmerged by taking a conveyance to a trustee, with a declaration of his intention to that effect. *Bailey v. Richardson*, 736

## MORTMAIN.

A bequest of a legacy, to be applied towards establishing a school at A., provided a further sum could be raised in aid thereof, if necessary:—*Held*, to import an intended outlay of the sum in building a school-house at the place referred to; and, therefore, to be a void bequest within the Statute of Mortmain. *Attorney-General v. Hull*, 647

## MOTION FOR DECREE.

See APPENDIX, pp. xxxi., lxxvii.

## NEXT FRIEND.

1. The Court refused to dismiss or refer to the Master for inquiry the bill of infant residuary legatees, filed by a next friend, although the estate might have been administered under a claim, or the fund protected by payment into Court under the Trustee Relief Act,—the propriety of any expenses incurred being a matter for consideration in ultimately dealing with the costs of the suit. *Smallwood v. Rutter*, 24

2. The Court had regard to the exercise of the discretion of the father of the infant plaintiffs in authorising the suit,—no improper motives appearing, although the father did not contribute to the maintenance of the infants, and lived apart from his wife, by whom the infants were supported. *Ib.*

3. In the absence of any fact impeaching the solvency, conduct, or character of the next friend of the infant Plaintiffs in the cause, notwithstanding he was a stranger to the family, the Court refused to refer it to the Master to inquire whether he was a proper person to be such next friend. *Ib.*

NEXT OF KIN.

See APPENDIX, p. xxxii.

NOTICE.

See MORTGAGOR AND MORTGAGEE.

A purchaser having notice that another person, or his under-tenant, is in possession of the property, is not justified in presuming the possession of that person to be the possession of the vendor; but is bound to make inquiries of the person who, by himself or his under-tenant, is so in possession, or he will be deemed to have notice of the title of such person. *Bailey v. Richardson,* 734

OATH.

See APPENDIX, p. lxxviii.

ORDER.

See APPENDIX, p. lxxviii.

ORNAMENTAL TIMBER.

See WASTE, 2.

PARISH REGISTERS.

See APPENDIX, p. xliii.

PARLIAMENTARY POWERS.

See PUBLIC POLICY.

1. A Railway Company having acquired a legal right to and possession of land, and constructed their Railway over the same under the provisions of their Act, another Railway Company, to whom the legislature had given power to purchase the same land for the purposes of their undertaking,

was restrained by injunction from exercising such power pending the trial of the legal question of the effect of such conflicting powers. *The Manchester, Sheffield, and Lincolnshire Railway Company v. The Great Northern Railway Company,* 284

2. As to the effect of two Acts of Parliament conferring on different Companies the right of purchasing compulsorily, according to the provisions of the Lands Clauses Consolidation Act, the same plot of land—*Quere.* *Ib.*

3. Where there is a parliamentary power to sell in fee, but with a restriction of the rights of ownership in the purchaser, and a conveyance to an owner in fee is made under such power, sound construction requires that the restriction imposed upon the purchaser, who becomes the owner in fee, shall not be extended beyond its necessary limits. *The Warden, &c., of Dover v. The South Eastern Railway Company,* 489

PARTIES.

See APPENDIX, pp. xxxii., lxxviii.

SUPPLEMENTAL BILL, 2, 3.

VENDOR AND PURCHASER, 5.

WASTE, 3.

1. The General Orders of the 22nd of April, 1850, do not enable a Plaintiff in a claim, suing for a legacy or for administration, to proceed against a surviving executor in the absence of the personal representatives of a deceased executor, where such personal representatives would have been necessary parties to a suit before those Orders were made. *Penny v. Penny,* 39

2. In a creditor's suit for the recovery of a partnership debt against the assets of a deceased partner, the surviving partner is a necessary party; and the case is not within the 32nd Order of August, 1841, which enables a Plaintiff to proceed against one or more persons severally liable. *Hills v. M'Rae,* 297

3. Upon a proceeding by claim in such a case, the surviving partner is not required to be before the Court at the hearing, but may be summoned before the Master. *Id.*

### PARTNERSHIP.

See JOINT-STOCK COMPANY, 5, 6.

PARTIES, 2, 3.

TRUSTEE ACT, 1850.

1. A gift and devise by one of the partners in a cotton-mill, of all his property, estate, and effects, to trustees, upon trust, to lay out and invest two-third parts thereof upon real or good personal security, or to transfer the same, and allow it to remain in the concern, of which he was one of the co-partners, in the names of his trustees, and alter, vary, change, and transpose the same as they should think fit, and stand possessed of the same, upon trust, for the two sons of the testator, with certain powers of advancement out of their respective shares:—*Held*, to authorise the executors to continue the monies of the testator in the trade, but not to trade with the monies by becoming partners in the firm. *Travis v. Milne*, *Milne v. Milne*, 141

2. The surviving partners of a testator dealing with the property of the testator, with the knowledge that it belongs to his estate, are bound to inquire into the trusts on which it is held, and are liable as if they had actual notice of those trusts. *Id.*

3. A suit by parties beneficially interested in the estate of a deceased partner cannot be maintained against both his executors and surviving partners, in the absence of special circumstances; but collusion is not the only ground for such a suit; and it may be maintained where the relation between the executors and surviving partners is such as to present a substantial impediment to the prosecu-

tion by the executors of the rights of the parties interested in the estate as against such partners. *Id.*

4. It is not to be assumed that the annual stock-taking by a partnership truly represents the interests of the several partners in the firm; but it may, or may not do so, according to the purposes for which, and the mode in which, it is made up. *S. C.*, 153

5. If a partner in a business, in which a secret process of manufacture and composition of materials is used, who has not, under the partnership contract, a right to the knowledge of the secret, should openly take part in the manufacture, and should, with the knowledge and concurrence of his partners, be permitted to acquire a knowledge of the process and ingredients, the other partners will be considered to have waived a right to the preservation of the secret for their separate benefit.—*Semble. Morison v. Moat*, 241

6. Bonds executed by partners to each other, relating to their rights as partners, of the same date as the partnership deed, read with the deed as part of the partnership contract. *S. C.*, 260

7. The payment of the expenses of advertisements out of partnership funds, is not necessarily a ground for giving to each partner, at the expiration of the partnership, a continuing share in the advantages of publicity produced by the advertisement; the partnership having had, during its continuance, the benefit of the expenditure. *S. C.*, 266

8. *A.* and *B.*, and the son of *B.*, entered into partnership as solicitors, and by articles agreed—(2) that the partners were diligently and faithfully to employ themselves in carrying on and managing all the professional business in which they or either of them might be employed or concerned; (5) that *B.* should use his best endeavours to obtain the ap-

pointment of the partnership firm to three offices or clerkships, which were then held by *B.*, and such offices should be partnership appointments; (6) that all other compatible offices should be obtained, if possible, in the name of the firm, and the emoluments treated as part of the profits of the partnership; (15) that if *B.* or his son should retire, or *A.*, or *B.* or his son, should die, the share of the deceased partner should accrue to the surviving partners; that if *B.* or his son retired, they were to use their best endeavours to secure the practice to the continuing partners, and such retiring partner should not practise within thirty miles; (16) that if either partner should not diligently and faithfully employ himself in carrying on the said partnership practice, and should, on receiving monies, bills, notes, &c., knowingly or wilfully omit immediately to make entries thereof, or if *A.* or the son of *B.* should absent himself more than two months in one year, the others or other of the partners, if they or he should think fit, should be at liberty to dissolve the partnership, by giving to the offending partner a notice to that effect; and the partnership should from that time, or the time specified in the notice, be dissolved, in the same manner and with the same consequences as if it had determined by the voluntary retirement of the offending partner. *B.* and his son subsequently procured their own appointment, or the appointment of one of them, to the offices or clerkships, and did not endeavour to procure the appointment of *A.* It was afterwards discovered that *B.* was greatly involved in debt, and he absconded in January, 1849, and did not return to the business. In May, 1849, *A.* served a notice, in the manner pointed out by the articles, on *B.* and his son, to dissolve the partnership from that date; and he then

filed his bill against *B.* and his son, to have the dissolution declared by the Court, an injunction to restrain them from practising within 30 miles, and a decree that they should resign the several offices or clerkships:—*Held*, that the Plaintiff was entitled to dissolve the partnership as to *B.*, but not as against the other partner (the son of *B.*), and that he was not entitled to dissolve it by notice under the 16th clause, without the concurrence of his co-partner (the son). *Smith v. Mules*, 556

9. That, *B.* not having procured or endeavoured to procure for the partnership firm the appointments to the several offices or clerkships, so as to give the Plaintiff at the dissolution either a share of the profits of the offices or the chance of competing for them, but such appointments having been procured for *B.* and his son to the exclusion of the Plaintiff, *B.* and his son were not to be allowed to retain the offices for their exclusive benefit. *Ib.*

10. That, inasmuch as, from the nature of the offices, they could not be sold, nor could any manager or receiver be appointed to carry them on, the Defendants ought to be charged with the value of the offices in the partnership accounts. *Ib.*

11. That, the Plaintiff having given a notice of dissolution (acting under the 16th clause), and his co-partner having adopted it, the partnership should be treated as dissolved from the time of the notice, although not with the consequences attaching to a dissolution under the 15th clause. *Ib.*

12. That, the consequences of a dissolution under the 15th clause not having attached, the Plaintiff, therefore, was not entitled to the injunction to restrain the Defendants from practising within 30 miles. *Ib.*

13. An agreement, that, if any of several partners should not diligently

and faithfully employ himself in carrying on the partnership practice, the others might give notice of dissolution—construed to refer to the diligent and faithful discharge by each partner of the portion of business carried on by him. *Smith v. Mules*, 569

14. A designed or wilful omission to make proper entries in the partnership books must be shewn, in order to establish a case of breach of the partnership articles on the ground of an omission to make such entries.

*Ib.*

#### PATENT.

1. Injunction granted against subjects of the kingdom of Holland, to restrain them from using on board their ships within the dominions of England, without the license of the plaintiffs, an invention, to the benefit of which the Plaintiffs were exclusively entitled under the Queen's patent. *Caldwell v. Vanvliessengen*, 415

2. Foreigners in this country, as well as British subjects, are liable to actions for the injury done by their infringing upon the sole and exclusive right granted by the Crown to patentees of inventions in conformity with the law and constitution of this country; and the powers of the Court of equity, which are founded on the insufficiency of the legal remedy, must be enforced against them as well as against British subjects. *Ib.*

3. The Crown has always exercised a control over the trade of the country; and though restrained by the common law and the Statute of Monopolies (21 Jac. 1, c. 3) within reasonable limits, the Crown might grant the exclusive right to trade with a new invention for a reasonable period. The stat. 21 Jac. 1, c. 3, did not create but controlled the power of the Crown in granting to the first inventors the privilege of the sole working and making of new manufactures. *Ib.*

#### PORTION.

4. The prohibitory words of the patent, which are addressed only to the subjects of this country, are in aid of the grant and not in derogation of it. *Ib.*

5. Principles upon which the Court will interfere to protect a patentee before he has established his right at law in the case of patents which have been long used or enjoyed, or will, in the case of new patents, suspend its interference until the right at law has been established. *S. C.*, 424

6. Whether there might not be a case of necessary user of an invention which the Court would not regard as the infringement of a patent—*Quere. S. C.*, 429

#### PAYMENT INTO COURT.

*See APPENDIX, p. lxxx.*

#### PAYMENT OUT OF COURT.

*See APPENDIX, pp. xliii., lxxxi.*

#### PERSONAL REPRESENTATIVE.

*See APPENDIX, pp. xli., lxxxii.*

#### PLEADING.

To a bill filed by the heir to set aside a purchase from his ancestor, on the ground of fraud, stating, also, that the purchase-money, or alleged consideration, was not paid,—the personal representative of the ancestor, having an interest in the question whether the contract is valid or not, is a necessary party: and if such personal representative be brought before the Court by supplemental bill, the original Defendant should be made a party to such supplemental bill. *Wilkinson v. Fowkes*, 193

#### PORTION.

*See ACCUMULATION, 2.*



### POWER OF SALE.

1. A power of sale given without restriction to a party having a limited interest only, may well be held to import a negative upon the power by the same party to buy, for the power to sell is in the nature of a trust; but as the rule does not extend to prevent, in all cases, a party having a power to sell from becoming the purchaser; so neither, where there is a restriction upon the power of sale, is the party having the power to sell in all cases at liberty to become the purchaser. It must, in each case, depend upon the circumstances under which, and the purposes for which the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. *Beaden v. King*, 519

2. In the proportion in which the power is restricted, the danger incident to allowing the donee to purchase is diminished. *Ib.*

### PRINCIPAL AND AGENT.

*See ACCOUNT, 3.*

### PRINTED BILLS.

*See APPENDIX, p. lxxxiii.*

### PRINCIPAL AND SURETY.

1. The case in which a surety has a right to sue his principal in equity to be discharged from his liability, is where the creditor has a right to sue his debtor, and refuses to exercise that right—*Semble. Padwick v. Stanley*, 627

2. In a suit by *A.* against *B.* and *C.*, a conveyance of an estate by *A.* to *B.* was declared void, and set aside for fraud, except as to an intermediate mortgage of the estate made by *B.* to *D.*, to secure a sum of money lent by *D.* to *B.*, and for which *C.* had joined *B.* as his surety in a bond and cove-

nant to *D.*; and the decree also directed *B.* to redeem the estate and procure its reconveyance to *A.*, and, if he did not do so, gave *A.* the right to redeem, and to use the name of *B.* for that purpose, and to recover from *B.* the money which *A.* should pay to *D.* for such reconveyance; and the bill was dismissed against *C.* *A.* afterwards procured an assignment of *D.*'s mortgage to a trustee, and in the name of the mortgagees brought an action against *C.* on his covenant and bond:—*Held*, that, if *A.* had redeemed *D.*, the debt would have gone as against *C.*; that *C.*, as the surety of *B.*, would, on payment of the mortgage debt, be entitled to the benefit of the security held by *D.*, such security not having been disturbed by the decree; that the charge of participation by *C.* in the fraud, whereby *B.* had been enabled to create the mortgage on the estate, was not a ground for depriving *C.* of such right; and that *C.* was, therefore, in a suit for an injunction to restrain *A.* from suing him on the bond and covenant, entitled to such relief. *Yonge v. Reynell*, 809

3. The circumstance of the dismissal, as against *C.*, of the bill brought by *A.* against *B.* and *C.*, which prayed that the mortgage debt might be paid by *B.* and *C.*, was material to the case, though it was not alone conclusive, as it might well be that there might be no equity to compel *C.* to pay the debt, though *C.* might have no equity to be relieved from his legal liability to pay it. *Ib.*

4. The right of a surety to the benefit of the security held by the creditor, is derived from the obligation of the principal debtor to indemnify his surety—*Semble. Ib.*

### PRIVILEGED COMMUNICATIONS.

1. The reasons of the rule which protects from disclosure communica-

tions made in professional confidence, apply in cases of conflict between the client or those claiming under him and third persons, but do not apply in cases of testamentary disposition by the client as between different parties, all of whom claim under him. The privilege does not belong to the executors as against the next of kin, but following the legal interest is subject to the trusts and incidents to which the legal interest is subject. *Russell v. Jackson*, 387

2. On a bill by the next of kin of a deceased party against his executors, who were his residuary devisees and legatees, alleging that the gift of the property was made to them upon a secret trust for the foundation of a school, the solicitor of the testator, who was also, after the death of the testator, the solicitor of the Defendants, the executors, was examined as a witness for the Plaintiff. On a motion by the Defendants to suppress the depositions of the solicitor on the ground of professional confidence:—*Held*, that the communications between the testator and the solicitor might be read; and that the communications between the Defendants, the executors, and the solicitors, after the death of the testator, were privileged. *Id.*

3. A privilege given for the protection of the client cannot have the effect of excluding evidence of a trust which he had intended to create, and thus defeat a claim by the parties who accepted the trust, to hold the trust property beneficially. *Id.*

4. Communications between solicitor and client, through the medium of an agent, are protected equally with communications had directly with the principal. *Id.*

5. The existence of an illegal purpose would prevent any privilege from attaching to the communications between solicitor and client—*Semble*. *Id.*

6. The clerk of a solicitor, who was the solicitor of the mortgagor and mortgagee in the creation of the security, and who copied the bill of costs of the solicitor in the transaction of making an appointment of the estate comprised in the security, and of preparing the mortgage deed, which was founded on the title created by the appointment, may be received as a witness to depose to the handwriting on the document (which proof alone does not make it evidence); but he cannot be received to depose further as to the contents of the bill of costs, or the subject to which it relates, for an attorney's bill of costs is his history of the transaction; and the attorney could not be himself permitted to give evidence of the transaction against his client, or against those claiming under his client. *Chant v. Brown*, 790

7. The consent of the personal representative of the mortgagor, who was one of the clients of the solicitor, to the admission of the bill of costs in evidence, does not make it evidence which can be admitted against the parties claiming under the mortgagee, the other client. *Id.*

8. Communications with the solicitor of the mortgagor only, or with the solicitor of persons having interests in the mortgaged estate in default of appointment, such solicitor not being the solicitor of the mortgagee, are not privileged communications when tendered as evidence in a suit to impeach the mortgage security as having been founded on an appointment made in fraud of the power. *Id.*

## PROBATE.

See LETTERS OF ADMINISTRATION.

## PROCEEDINGS BEFORE THE JUDGE IN CHAMBERS.

See APPENDIX, pp. xlviii., lxxxiii.

PRODUCTION OF DOCUMENTS.

See APPENDIX, p. xlix.

PROFITS.

See JOINT-STOCK COMPANY, 6.

PROSPECTIVE ORDER.

See APPENDIX, p. lxxxiv.

PUBLIC POLICY.

An agreement between two Railway Companies, made without the authority of the legislature, whereby one Company delegates to another all the powers which have been conferred upon it by Parliament, is an unlawful attempt to effect that which Parliament alone can authorise, and is against public policy; and in such a case, the Court will not interfere to assist either of the parties in obtaining a collateral benefit, which the agreement would give, or aid them in any manner which would promote the object of the agreement. *The Great Northern Railway Company v. The Eastern Counties Railway Company*, 306

PUFFER.

See VENDOR AND PURCHASER, 16.

PURCHASE DEED.

See APPENDIX, p. lxxv.

PURCHASE MONEY.

See APPENDIX, p. l.

PURCHASES FOR RE-INVESTMENT.

See APPENDIX, p. l.

RAILWAY COMPANY.

See PARLIAMENTARY POWERS.  
PUBLIC POLICY.

1. Construction of an agreement between two Railway Companies enabling one to pass over and use the railway stations, watering places, and sidings, upon and appertaining to the other, and giving the right of access to such parts of the stations and appurtenances as were necessary to the traffic on and over the other, with a covenant to give the same facilities and assistance as their own traffic of the like character should receive. *The Great Northern Railway Company v. The Eastern Counties Railway Company*, 309

2. One Railway Company having granted to another the use of their lines, and of all conveniences upon the lines, cannot object to their grantees using the conveniences so granted for any purposes to which they may be able to apply them, even if the grantors themselves were not entitled to use them for such purposes—*Semble. S. C.*, 310

3. Where a Railway Company are entitled to retain the possession of lands which they have taken, they must also be entitled under their compulsory powers to perfect their title. *Sparrow v. The Oxford, Worcester, and Wolverhampton Railway Company*, 446

4. A provision in an Act for making a railway, that certain land to be purchased by the Railway Company should be appropriated to and used solely for the purposes of the railway and the buildings connected therewith, (except such part as might be required by the Board of Ordnance, or for widening approaches to the station), and should not be used or employed for erecting thereon any coke ovens, or for any other purposes (the necessary railway purposes only

excepted) by which any nuisance might be created, or the other property of the vendors in any way damaged:—*Held*, to refer to the use of the land, or the mode in which it was to be laid out or applied, and not to refer specifically to the use of the buildings which might be erected upon the land. *The Warden and Assistants of the Harbour of Dover v. The South Eastern Railway Company*, 489

5. That "buildings connected therewith" did not mean buildings only connected locally with the railway, but meant buildings especially applicable to the uses of that particular railway; and that the construction of the clause was not to be governed by considerations of what would or would not be connected with other and different railways. *Id.*

6. That the building erected by the Company being used as a Custom-house for the examination of the luggage of passengers landing from the continent, many of whom travelled by the railway, such user was for a purpose connected with the railway; and that the use being, to some extent, for such purpose, it did not cease to be so within the meaning of the provision, merely because all the purposes for which the building was used were not purposes connected with the railway. *Id.*

#### RECEIVER.

See APPENDIX, p. 1.

It is not necessary to bring to a hearing a suit for the appointment of a receiver pendente lite. *Anderson v. Guichard*, 275

#### REFERENCE.

See APPENDIX, pp. 1, lxxxvi.

#### RELEASE.

1. By a deed conveying the real

#### RENEWAL OF LEASE.

and personal estate of a debtor to trustees for the benefit of his creditors, the creditors executing the deed covenanted that it should operate and enure, and might be pleaded in bar, as a good and effectual release and discharge of all and all manner of actions, suits, bills, bonds, writings, obligations, debts, duties, judgments, extents, executions, claims, and demands, both at law and in equity, which they or any of them had or might have against the debtor or his estate or effects, for or by reason of all or any of the debts or engagements to them respectively due or owing by him; such covenant not to destroy any mortgage, pledge, lien, or other specific security which any creditor possessed:—*Held*, upon the construction of the entire deed, that such general words had not the effect of releasing a judgment previously obtained by one of the creditors who executed the deed, so as to affect the priority of the creditor as between himself and a judgment creditor who was not a party to the deed, or so as to preclude the judgment creditor who executed the deed from enforcing the right which the judgment gave him as against the estate vested in the trustees. *Squire v. Ford*, 47

2. Principles of the Court in giving effect to the intention of the parties to a general release, with reference to the restrictive clauses which it contains, or to the purposes for which it is made. *S. C.*, 55

3. Effect of a general release by a party entitled to a charge on real estate secured by a term of years to the trustees of the term, the term itself not being assigned or merged. *Clifford v. Clifford*, 675

#### RENEWAL OF LEASE.

1. Equity will not decree the specific performance of a covenant by

## REVERSION.

the mesne landlord with his lessee for the renewal of the lease, after the lessee has wilfully neglected or refused to renew; and the non-payment, after demand, of the fine which the mesne landlord has paid to the superior landlord, amounts to such neglect or refusal. *Chesterman v. Mann*, 206

2. An under-lessee who is not himself bound to take a renewal of his lease, but who is entitled to the benefit of a covenant by his lessor for the renewal of his under-lease, upon payment of his proportion of the fines and expenses of a renewal by the superior landlord, ought, if he complains of the amount of such proportion required from him by the mesne landlord, to apply without delay to a Court of equity to assess the sum which he ought to pay, submitting himself to the jurisdiction of that Court, to compel him to pay a reasonable sum; and if, instead of making such application, and after notice from his mesne landlord that the fine must be paid in a certain time or his right will be excluded, he should delay the payment, the objection that the sum demanded from him was unreasonable, will not excuse his laches. *Ib.*

3. The time from which the lessee will be deemed to have neglected or refused to renew, is not to be computed from the latest time at which the mesne landlord might have procured a renewal; but from the time at which he applies to the under-lessee to contribute to the fine and expense of the renewal which he is about to obtain or has obtained. *Ib.*

## REPLICATION.

*See APPENDIX, p. lxxxvii.*

## REVERSION.

*See HUSBAND AND WIFE, 1, 6.*

## SERV

### REVERSIONAR

*See MORTGAGOR AN*

### REVIVOR AN MEN

*See APPENDIX, p1*

### SALE IN FOR SUIT

*See APPENDI*

### SCHEM

*See APPENDI  
CHARITY*

### SCHO

*See FREE SC  
GRAMMA*

### SECE

*See INJUNC*

## SERV

A bequest of a y of the servants of t with him at his d then have lived thr vice:—*Held*, not t of the testator liv house from that i tor lived, but to e: hired by the year; that a gardener, e wages, (although 1 tervals), was not nefit of the bequ *Pennant*,

2. Whether the me," as applied not be understood vice"—*Quære. S*

## SERV

*See APPEN*

SERVICE OF THE DECREE  
OR ORDER.

See APPENDIX, pp. lv., lxxxix.

## SET-OFF.

1. Cross demands, existing in separate rights, are not, in equity, (except under special circumstances) allowed to be set off one against the other; and therefore an executor and trustee of a legacy, who was also the residuary legatee, and had become a creditor of the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set-off his debt against the legacy to which the husband (having survived his wife the legatee,) was, as such administrator, entitled. *Freeman v. Lomas*, 109

2. The equitable right of set-off is not derived from or dependent upon any statutory right, but is founded on the Roman law—*semble*. *S. C.*, 113

3. The Court has, on slight circumstances, presumed the existence of an agreement to set off one against another cross demand, although existing in different rights; but such an agreement will not be presumed without some circumstances from which it might be inferred—*semble*. *S. C.*, 114

4. Where one demand is equitable and the other legal, there may be set-off in equity, if there would be set-off at law had both the demands been legal. *S. C.*, 116

## SETTLEMENT.

See HUSBAND AND WIFE, 3, 4, 5.

## SHIP.

See PATENT, 1.

1. No question arises as to the jurisdiction of this Court in enforcing

the rights of some against the other part owners of a ship, with regard to the management of the ship and the possession of the certificate of registry, where those rights are regulated by an agreement entered into between all the owners of the ship. *Darby v. Baines*, 369

2. Powers and duties of the managing owners of a ship as between themselves and the other part owners. *Ib.*

3. Construction of an agreement entered into by the part owners of a ship, with regard to the management of the ship and the allowances for brokerage and commission. *Ib.*

4. On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was, that the purchase-money should be paid to the solicitor of the assignees on or before a certain day, when the purchase was to be completed, and the purchaser to have possession and a bill of sale; the purchaser paid part of the purchase-money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale:—*Held*, that the payment, and the execution of the bill of sale, ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to a decree for specific performance of the contract, by the execution of the bill of sale by the assignees upon payment to them of the balance of the purchase-money. *Hughes v. Morris*, 636

SIGNING THE REGISTRAR'S  
BOOK.

See APPENDIX, p. lxxxix.

## SOLICITOR.

*See Costs.*

## SOLICITOR AND CLIENT.

*See ASSIGNEES.*MORTGAGOR AND MORTGAGEE, 2, 3.  
PROFESSIONAL COMMUNICATIONS.

1. A deed prepared by an attorney, and executed by his client, a young man who had applied to him to procure a loan of money, settling the property of the client so as to restrict his power of dealing with it, and appointing the attorney the trustee, recited that the trusts of the deed were created at the desire of the client, and for the purpose of placing the property under the management of the attorney. The client, by his bill to set aside the deed, denied the truth of the recitals, and insisted that the settlement was made without his knowledge or authority. The attorney, by his answer, alleged that the recitals were true, and that the deed was made and executed with the knowledge and authority of the client, and in order to prevent him from dissipating his property, but gave no evidence of such knowledge or authority:—The Court *held* that the burden of proof was upon the attorney, and set aside the deed, with costs to be paid by him. *Moore v. France*, 299

2. *A.*, who was an equitable mortgagee by deposit of deeds of property belonging to the estate of *B.*, was paid off by *C.*, on an agreement with the executors of *B.*, (as their solicitor stated), that proceedings should be taken in *A.*'s name to enforce the mortgage security, and thereby to effect a sale of the whole or part of the mortgaged property; and the solicitor of the executors filed a claim for foreclosure in the name of *A.* against the representatives of *B.* *A.* denied that he had given authority to file

the claim in his name, and that it might be *held*, that there was no evidence against assertion, alone stating that the trusts were given in the case was to be *v. Bone*, and the costs, to the solicitor. *Crossley v.*

3. That, in such a case, the Court could not adjudicate against the solicitor, by whom the deed was made, and the Defendant's trustees of *B.*, by whom the deed was given to file name; and the Court to any legal claim made against such

SC

1. The authority of a son or sons as a word of limit the intention of the testator, therefore or necessary rule by which the Court is determined in determining the intention. *East v. T.*

2. The question of "sons" be used as a word of limitation; upon which the Court has decided in favor of an important bearing.

## SPECIAL

*See APP.*

## SPECIAL C

*See APP.*

## SPECIFIC F

*See ASSIGN*

RENEW

UNCER

1. The Court will enforce an agree

the parties to the cause, after the cause was at issue, to compromise the suit, refused to dismiss the bill, or to stay the proceedings in the cause. *Askew v. Millington*, 65

2. The proper proceeding to enforce an agreement for the compromise of a suit, where such agreement goes beyond the ordinary range of the Court in such suit, or where the Court has, in enforcing the agreement, to adjudicate on equities distinct from the equity appearing on the record in the cause, is, by bill for specific performance, and not by interlocutory application in the existing cause—*Semble*. *Ib.*

3. A contract entered into by the promoters of a Railway Company with a landowner, to pay a certain sum for the portion of his lands to be taken for the intended railway and for consequential damage, in consideration of which agreement the landowner withdrew his opposition to the bill:—*Held*, to be binding, although, after the passing of the Act, the intention of making the railway be abandoned, and no part of the land be taken or required. *Webb v. The Direct London and Portsmouth Railway Company*, 129

4. Specific performance decreed of an agreement to pay, for the lands to be taken for a railway, a certain sum, which included not only the purchase-money of the lands, but compensation for the consequential damage to the property of the landowner; the case not being one in which compensation was under the Act a distinct subject of contract, but being merely an agreement by the landowner to accept a sum in full for the purchase and damage; the purchase being the substance of the agreement, and the damage an incident. *Ib.*

5. The fact that the Railway Company had, by the lapse of time, lost

the powers which the legislature had given them to take lands, did not deprive them of the right to hold lands which they had acquired during the existence of their powers, nor did it release them from their obligations which they had then contracted with reference to the purchase of land. *Ib.*

6. The fact, that the performance of an agreement has, owing to circumstances which have subsequently occurred, become hard in its consequences to one of the parties, or that he is called upon to perform it under circumstances which he had not contemplated, is no objection to the specific performance of the contract in equity, there being nothing doubtful in the meaning of the agreement, and nothing hard or oppressive in its terms at the time it was made—*Semble*. *Ib.*

7. A contract for the purchase of copyhold land at a certain price, and the timber upon it at a specified valuation, enforced as one entire contract, although the vendor could not shew any custom in the manor, or license from the lord, enabling the tenants of the manor, or himself, or his assigns, to fell the timber. *Crosse v. Keene*, 469

#### STAMP.

*See* APPENDIX, pp. lvii., xc.

#### STATE OF FACTS.

*See* STATUTES—3 & 4 WILL. 4, c. 27.

#### STATUTES.

\*21 JAC. 1, c. 3—(STATUTE OF MONOPOLIES).

*See* PATENT, 3.

39 & 40 GEO. 3, c. 98.

*See* ACCUMULATION.



# STATUTES.

52 GEO. 3, c. 101.

See CHARITY, 2, 4.

54 GEO. 3, c. 173; 57 GEO. 3, c. 100.

See LAND-TAX REDEMPTION.

1 & 2 GEO. 4, c. 92.

The Commissioners, appointed under the stat. 1 & 2 Geo. 4, c. 92, and the Bishop, having found that an exchange of the charity lands would be beneficial, and the same having been effected according to the statute, the Court has no power to reverse their decision; and it is immaterial that the Bishop was himself one of the trustees of the charity, the Bishop having no personal interest in the property. *Attorney-General v. The Bishop of Worcester*, 328

3 & 4 WILL. 4, c. 27—(STATUTE OF LIMITATIONS).

1. On a bill to enforce a charge acquired by a judgment creditor on the estate of the debtor, a receiver was appointed, and, at the hearing, a reference as to incumbrances on the estate was directed. A state of facts and claim carried in before the Master under such inquiry by an incumbrancer, not a party to the suit, was held to take the charge as to the interest out of the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 42); and the incumbrancer was held to be entitled to arrears of interest for six years antecedent to the time of such claim. *Greenway v. Bromfield, Handley v. Wood*, 201

2. A petition in lunacy, after the death of the lunatic, by his committee, and a reference to the Master thereon, followed by a report, finding that a sum of money had been expended by the committee in the maintenance of the lunatic, is not a pro-

ceeding which will the committee out Limitations, as a law of the lunatic party to the applic *v. Wilkinson*,

4 WILL.

Under the Eschenies may be followe the lords of the fi otherwise, the esta the lord by esches debts of the persor escheated. *Hughes*

1 & 2 VICT. c. 1  
AC

See ALI

7 & 8 VI

1. The 8th sect 8 Vict. c. 70, "for f ments between del which enacts, that the resolution and mentioned, all th of the petitioning the trustee (if ar fully as if such t signee in bankru cessarily the effec trustee all the e the petitioning de so much of such the debtor may g ditors accept, or tate and effects the trustee is ap *Hobbs*,

2. The second convened under t Act may accept vary, the terms sented to by the ble.

8 VICT. c. 18.—(LANDS CLAUSES CONSOLIDATION ACT).

1. A Railway Company, having given notice of their intention to purchase lands for the undertaking, deposited the purchase-money, and delivered the bond (according to the provisions of the 85th section of the Lands Clauses Consolidation Act), before the expiration of the period prescribed for the exercise of their compulsory powers; neither their power to purchase the land, nor their power to enter, is gone by the subsequent expiration of that period. *Sparrow v. The Oxford, Worcester, & Wolverhampton Railway Company*, 436

2. The powers for the compulsory purchase and taking of lands referred to in the 123rd section of the Lands Clauses Consolidation Act, are powers given to the several promoters of the several special Acts in which that Act might be incorporated, and not several powers given to the promoters of each special Act. *Ib.*

3. The 123rd section of the Lands Clauses Consolidation Act refers to the powers given by the Act for the purchase and taking of land; but not to the powers thereby given for carrying into effect a purchase already made. *Ib.*

4. Powers under the head of the purchase and taking of lands distinguished into those strictly for that purpose, and those which are powers for carrying into effect a purchase already made. *S. C.*, 445

5. The clauses 58 to 67 of the Lands Clauses Consolidation Act refer to lands which may more properly be said to be taken than purchased. *Ib.*

6. Where there is no original equity affecting the claim of a party to compensation under the 68th section of the Lands Clauses Consolida-

tion Act, in respect of lands injuriously affected, the statute does not create such an equity, but where there is an original equity affecting the claim, the statute does not take it away. *Duke of Norfolk v. Tennant*, 745

7. Where, therefore, an agreement for such compensation has been completed and carried out, and the satisfaction perfected, there is no ground for the interference of the Court, arising out of the provision of the statute; but where the Defendant has received the consideration for perfecting the satisfaction, and refuses to perfect it, and a case for specific performance arises, there is nothing in the statute to exclude the interposition of the Court. *Ib.*

8. The Court does not interfere by injunction to restrain parties who insist that their property has been injuriously affected within the meaning of the 68th section of the Lands Clauses Consolidation Act, from prosecuting their claim under the Act, upon the mere ground that the Act has not provided the means of determining the preliminary question, whether the property has been injuriously affected or not; but whether the same rule applies to a case in which there are several grounds of claim, some of which have been satisfied—*Quære.* *Ib.*

8 VICT. c. 20.—(RAILWAYS CLAUSES CONSOLIDATION ACT).

Whether the 92nd section of the Railways Clauses Consolidation Act does or does not convert Railways into public highways; and whether that section be or be not controlled by the 87th section of the same Act, giving powers to Companies to enter into agreements as to passing over or along each other's lines; yet, when an agreement as to the terms of passing

over or along each other's lines has been entered into between Railway Companies, their rights in respect of such passing depend upon the terms of the agreement, and are no longer governed by the provisions of the Railways Clauses Consolidation Act. *The Great Northern Railway Company v. The Eastern Counties Railway Company*, 306

9 & 10 VICT. c. 73, s. 19.

See TITHE.

The words "every instrument" in sect. 19 of the Tithe Commutation Amendment Act, 9 & 10 Vict. c. 73, cannot be read as "every such instrument." *Walker v. Bentley*, 633

10 & 11 VICT. c. 96.

A trustee paying into Court a sum of money under the Trustee Relief Act, (10 & 11 Vict. c. 96), although such sum may be less than the amount of the trust fund in his hands, is discharged as to the money so paid in; and after such payment the parties beneficially interested can proceed only under the Act to recover the money so paid in; and the ordinary jurisdiction of the Court, as against the trustee, is confined to the balance which may remain due from the trustee in respect of the trust fund after such payment. *Goode v. West*, 378

11 & 12 VICT. c. 45.

See JOINT STOCK COMPANY.

1. The official manager, prosecuting, under the 53rd section of the 11 & 12 Vict. c. 45, a suit previously commenced, can have no better right than the original Plaintiff had, but must adopt the suit with all its imperfections and infirmities, and can only make such amendment in it as the state of the cause would have al-

lowed the original *Official Manager of &c. Railway Company*

2. Whether a suit Winding-up Act 11 s. 53, be brought on shareholders except or otherwise than a entire Company—

12 & 13 VICT. c. 106,  
RUPT LAW CONSOL  
See TRUSTEE AND CE

13 & 14 VICT.

Questions on which the Court of Chancery for the opinion of C law, or to seek the Judges of such C statutes 13 & 14 V and 14 & 15 Vict. c. wise. *Falkner v. G*

13 & 14 VICT.

Affidavits admitted under the stat. 13 s. 28, as evidence of trust funds by deceased person suit by a party claiming appointment. *Deve*

13 & 14 VICT. c. 60  
185

Two partners in the property of w freehold and copyl nanted that the su the option of purch the deceased partn of the partnership and the survivor cised such option, executors of the the amount at wh

valued. The share of the deceased partner and his legal estate in part of the freehold and copyhold estates of the partnership descended or became vested in his infant heir; but the Court refused, upon petition or motion under the Trustee Act, 1850, without suit, to declare the infant heir a trustee for the surviving partner. *In the Matter of William Henry Burt, an Infant, and of the Trustee Act, 1850,* 289

13 & 14 VICT. c. 83, s. 60—(TRUSTEE ACT, 1850).

On the petition of the executors of a mortgagee in fee, who had not been in possession or receipt of the rents and profits of the mortgaged premises, who had died intestate as to the legal estate, and whose heir could not be found, the Court, under the Trustee Act, 1850,—the mortgage debt remaining unpaid,—made an order vesting the mortgage estate in such executors, subject to the equity of redemption. *In the Matter of Boden's Estate, and of the Trustee Act, 1850,* 820

14 & 15 VICT. c. 83, s. 8.

*See* 13 & 14 VICT. c. 35, s. 14.

14 & 15 VICT. c. 99.

*See* APPENDIX, p. lxx.  
EVIDENCE.

#### SUPPLEMENTAL BILL.

1. A supplemental suit grafts into the original suit the new parties brought before the Court by the supplemental suit, and enables the Court to deal with the parties to both records, as if they were all parties to the same record. *Wilkinson v. Fowkes,* 193

2. A Defendant to an original suit

#### TITHES

is not to be made a party to a supplemental suit, on the mere ground of a right to question the representative character of a Defendant to the supplemental suit; for his title to sustain that character cannot be tried in this Court. *Id.*

3. The original Defendants are necessary parties to a supplemental bill, where the supplemental suit is occasioned by an alteration after the original bill is filed, affecting the rights and interests of the original Defendants as represented on the record; but they are not necessary parties to a supplemental bill, where there may be a decree upon the supplemental matter against the new Defendants, unless the decree will affect the interests of the original Defendants; nor are they necessary parties, where the supplemental bill is brought merely to introduce formal parties. *Id.*

#### SUPPLEMENTAL STATEMENT.

*See* APPENDIX, p. xci.

#### SURGEON AND PATIENT.

*See* FAITH AND CONFIDENCE.

#### TASTE OR ORNAMENT.

*See* TRUST, 1, 2, 3.

#### TENANT FOR LIFE AND REMAINDERMAN.

*See* COSTS, 3.

FINES ON RENEWAL.

#### TIMBER.

*See* VENDOR AND PURCHASER, 10,  
11, 12.  
WASTE, 2, 3.

#### TITHES.

1. The enactment of the Tithe

Commutation Amendment Act (9 & 10 Vict. c. 73, s. 19), that every instrument purporting to merge any tithes, and made with the consent of the Tithe Commissioners, shall be absolutely confirmed and made valid, both at law and in equity, in all respects, is not limited to cases in which the person executing the instrument has a title to the tithe, but operates as well where such person has no estate in the tithe, as where his estate is insufficient to effect the merger. *Walker v. Bentley*, 629

2. The intention of the Tithe Commutation Act is, that the lands on which the apportionment of the tithe in each parish is cast, and these lands only, shall be liable in respect of the tithe payable for any lands in the parish; and that lands on which no apportionment is cast, shall not be liable to tithe. *Ib.*

3. Lands, which on the agreement and apportionment under the Tithe Commutation Acts (confirmed by the Tithe Commissioners) are treated as free from tithe, cannot be afterwards made subject to tithe. *Ib.*

4. The intention of the legislature was to preclude all questions of merger of tithe in all cases where declarations of merger had been made with the consent of the Tithe Commissioners, leaving the parties affected by an erroneous declaration to their remedy against the party making it; and, such being the intention, the merger is effected, although the sanction of the Commissioners has been erroneously given. *Ib.*

#### TITLE.

See APPENDIX, p. lviii.

COSTS, 2.

VENDOR AND PURCHASER, 2, 4.

#### TITLE OF ACCOUNT.

See APPENDIX, p. lix.

#### TRUST.

1. The case of a trust or restriction created for the preservation of ornamental timber, is not like a trust for purposes of benevolence (as to which the objects are unlimited, and no standard can be found), but, *semble*, is a trust or restriction which the Court will endeavour to execute or enforce. *Marker v. Marker*, 1

2. There are cases in which the Court may execute a trust for the application of money to purposes of taste or ornament, and, in doing so, may, in the absence of any prescribed standard, or if the standard be more or less indefinite, act upon the opinions of persons who are consulted by others in such matters, as it acts in other cases upon the opinions of persons of science—*Semble*. *Ib.*

3. The Court may more readily act in enforcing a restriction on the exercise of the legal power in a matter of taste or ornament, where the restriction is connected with a trust, than in the case of equitable waste in the absence of any such trust—*Semble*. *S. C.*, 18

#### TRUSTEE AND CESTUI QUE TRUST.

See COPYHOLD.

COSTS, 1, 4.

LAPSE OF TIME.

STATUTES—7 & 8 VICT. c. 70.

10 & 11 VICT. c. 96.

1. A power to appoint a new trustee in the place of a trustee who should become incapable to act, contemplates the personal incapacity of such trustee; and therefore a trustee, who had become bankrupt, and been indicted for not surrendering to the fiat, and had absconded, was held not thereby to have become "incapable" of acting in the trust, within the meaning of the power. *In the Matter*

*of Watts's Settlement, and of the Trustee Act, 1850, and the Stat. 1 Will. 4, c. 60,* 106

2. Where there are several trustees, one of whom is out of the jurisdiction, and a new trustee is appointed by the Court in his place under the Trustee Act, 1850, an order vesting the trust estate in the new and continuing trustees will, under the 10th section of that Act, have the effect of severing the joint-tenancy—*Semble.* *Ib.*

3. The Court has not jurisdiction under the Trustee Act, 1850, to take away the power of appointing new trustees from the donee of the power, where the donee is capable of exercising, and willing to exercise, the power, although such donee may have disclosed an intention or desire to exercise his power corruptly. *In re Hodson's Settlement, and of the Trustee Act, 1850,* 118

4. Form of order appointing a trustee in the place of a trustee out of the jurisdiction, where there is another and continuing trustee, and the vesting order is not made. *In re Plyer's Trust, and of the Trustee Act, 1850,* 220

5. A suggestion by the trustees of a fund, that the administrator of one of the cestui que trusts, who, in that character, was entitled to a distributive share of the fund, had unfairly obtained the letters of administration under which he claimed such share, is no defence in this Court to the claim of the administrator; nor is it a defence for trustees to suggest that a deed, under which the Plaintiff derives his title from the cestui que trust, was founded on mistake, or is otherwise subject to be displaced; for it is contrary to the course of the Court to direct an inquiry as to the validity or invalidity of a deed, upon a suggestion in the answer of Defendants, the trustees of the fund to

which it relates, where the ascertainment of the validity or invalidity of the deed is not essential to the safety of the Defendants; and the fact of a bill having been filed to set aside the deed under which the claim is made, or exclude the fund in question from its operation, is not a ground upon which the trustees can resist the legal title to receive the fund; for the Court cannot give the Plaintiff in such other suit the benefit of an injunction to protect the fund upon the suggestion in the answer of the trustees; but the existence of such other suit entitles the trustees to retain such a portion of the trust fund as may be sufficient to answer their costs of such other suit. *Devey v. Thornton,* 222

6. It is not, necessarily, sufficient, to entitle trustees to their costs of a suit, that they have acted under the advice of counsel. *S. C.,* 232

7. Matters of personal or private feeling cannot be considered in a question either of merits or of costs, as between trustee and cestui que trust; and therefore a trustee who deems himself to be or is assailed by imputations cast upon him by his cestui que trust, is not justified in refusing to do an act which his trust requires, until he receives an apology from the cestui que trust; and if he refuses, from want of such apology alone, to do an act which his duty as trustee requires, he will be liable to the costs of a suit brought to enforce the performance of such duty. *Moore v. France,* 299

8. A trustee is not, in all cases, to be made liable upon the mere ground of having deviated from the strict letter of his trust; for such deviation may be necessary or beneficial to the interests of the cestui que trusts; but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the

## UNCERTAINTY.

peril of afterwards satisfying the Court that the deviation was necessary or beneficial. *Harrison v. Randall*, 397

9. The existence of a suit in which an appointment of trust-funds made in execution of a power is brought before the Court, and directions consequential thereto are obtained, and the trustees retire and are succeeded by others, but in which material facts connected with such appointment of the trust-funds are not brought to the knowledge of the Court, does not protect the retiring trustees from the liabilities which result from such facts, if they involve a breach of trust; but, on the contrary, renders such breach of trust less excusable. *Id.*

10. A trustee, who, having good reason to doubt the validity of an appointment, thinks proper to act upon it, must be affected by the consequences which follow upon the act. *Harrison v. Randall*, 407

11. Order by the Vice-Chancellor, —and not by the Court sitting in Bankruptcy,—for the appointment of new trustees in the place of a bankrupt trustee, and the payment of the trust funds to such new trustees, under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 130. *In re Heath*, 616

12. The non-interference of the trustees for a long period does not preclude them or their representative from sustaining a suit for carrying the trust into effect, so long as the trust subsists. But, *semble*, on the contrary, it is the duty of the trustees or their representative to take steps for enforcing the trust. *Hughes v. Wells*, 749

## UNCERTAINTY.

See LEGACY, 1.

1. A bequest will not be held

## USURY

void for uncertainty, meaning be not absolute: the Court can arrive at a degree of certainty. *A*

2. Where a legacy legatee by the name of "C. H., the wife of" in fact the wife of A. daughter, an infant of the Court would not there was any misapprehension of the will; more probable that the mistaken the name of the legatee, that the legatee intended to be paid according to the intention and not according to the name.

3. Bill for the specific performance of an agreement to grant patents for the use of the defendant's inventions, embodied in Nisi Prius, the Defendant that they were bound to perform, and that it was not specifically performed, but meaning—dismissed on the ground that the agreement was framed in terms capable of any certain meaning. *Tatham v. Platt*,

## UNDERTAKING

See APPENDIX, p. 1.  
JOINT-STOCK COMPANY

## USURY

An agreement made between the intended mortgagor and the mortgagee, that the mortgage-money, at the time of the mortgage, be reduced to 4l. per cent. within a limited time from the date of the

fer, being the date of the deed of transfer, although, owing to the mortgagor being then unprepared to procure the execution of that deed, the mortgage-money, which was then ready to be advanced, was not actually advanced until a subsequent time:—*Held*, not to be usurious,—less than 5l. per cent. having, in fact, been taken, the transaction being *bonâ fide*, and there having been no absolute reservation of more than 5l. per cent., but only a reservation from the burden of which the mortgagor might, at his option, have discharged himself. *Long v. Storie*, 542

## VENDOR AND PURCHASER.

See LAND TAX REDEMPTION, 1, 7.

NOTICE

POWER OF SALE.

SHIP.

WASTE, 3.

1. *B.* became the purchaser of premises at an auction, declaring himself the agent of *C.* in *C.*'s presence; but the vendors' solicitor required *B.* to sign the agreement, and declined to substitute the name of *C.* Communications afterwards took place between the vendors' solicitor and *C.*, with reference to the title. The vendors afterwards brought their bill against *B.* and *C.* for specific performance of the contract:—*Held*, that, supposing *B.* to be the agent of *C.*, yet the signature of *B.* to the contract made him personally liable to perform it. *Chadwick v. Maden*, 188

2. That the communication between the vendor's solicitor and the solicitor of *C.* with reference to the title, was not an adoption of *C.* as the purchaser in the place of *B.*, but should be assumed to be made in furtherance of the original contract, in which, according to *B.*'s representa-

tion, he was (as between himself and *C.*) only a formal party. *Ib.*

3. That the bill of the vendors having been dismissed against *C.*, at his instance, *C.* would not be allowed to set up, in a suit by *B.* against himself, that the decree against *B.* in the suit of the vendors had been improperly obtained in his absence. *Ib.*

4. That the acceptance of the title by *C.* in such communications would not be binding upon *B.*, for such acceptance would be regarded as having been made in *C.*'s own right, as claiming through *B.*, and not as agent for *B.* *Ib.*

5. A party claiming an interest in a purchase by virtue of a contract, as having been entered into on his behalf, is a proper party to a suit by the vendor for the specific performance of the contract; otherwise, if he claim merely as a sub-purchaser—*Semble*. *Ib.*

6. After a sale by auction of a messuage and lands, one of the conditions of which was, that any mistake or error in the description of the property, or any other error in the particulars, should not annul the sale, but (except where otherwise provided for by the conditions) a compensation should be given or taken, to be settled by two referees, or an umpire,—it was found that one of the lots contained about twenty acres more, and another about ten acres less, than the quantity of land described in the particulars:—*Held*, that, upon the construction of the condition, the mistake or error thereby contemplated was such a mistake or error as would annul the contract. *Leslie v. Thompson*, 268

7. That the excess of the quantity of land in one of the lots, and the deficiency in the other, were both subjects of compensation within the condition; and that the Court would, if



necessary, refer it to the Master to settle the amount of such compensation, notwithstanding that, from the variety in the nature of the different portions of the land in which the variations occurred, there was no uniform standard for computing such amount. *Ib.*

8. That, whether a vendor could, or could not, in equity be relieved, on the ground of mistake, from a contract for the sale of lands inaccurately described as to quantity, and which description has been prepared by his solicitor from former particulars and conditions relating to the same property, drawn up by another solicitor on the report of a surveyor,—equity would not, in such circumstances, enforce the contract against the vendor, unless the case should be one for compensation, and the purchaser should submit to make such compensation. *Ib.*

9. The actual designation, in the particulars of the property offered for sale, of the number of acres contained in a lot—*Held* to negative the presumption of any intention on the part of the vendor to sell the estate in the lump. *Leslie v. Thompson*, 273

10. On a contract for the sale of lands, described as partly freehold and partly copyhold, and the timber thereupon (the latter at a specified valuation), upon a condition that the vendor should not be required to distinguish the freehold land from the copyhold, nor the respective boundaries thereof, it was *held*, that, upon the particulars and conditions, the contract for the land and timber was one contract, and not separate contracts; and that the purchaser was bound to pay for the timber at the valuation, notwithstanding the fact that it might be wholly upon the copyhold land, and therefore subject

to the rights of the lord, and the restrictions of the custom. *Crosse v. Laurence*, 462

11. Where, upon a contract for the sale of an estate, a separate and distinct contract is made for the sale of the timber upon it, the Court will not enforce the latter contract unless the vendor can give the purchaser such possession and dominion over the timber as will entitle him to fell and remove it; but, if an entire contract be made for the sale, both of the estate and the timber (notwithstanding the purchase-money is made up of distinct sums for each), the vendor is only bound to make out his title to the land according to the contract; and the title to the land is the title to the timber upon it. *Ib.*

12. The purchaser of undistinguished freehold and copyhold land and timber, under a single and entire contract, must be considered as estimating, in the price he pays for the land, the price he pays for the timber. *S. C.*, 467

13. Pending a dispute respecting the title to land contracted to be sold, and to avoid the question as to the interest of the purchase-money, the vendor gave the purchaser the opportunity of investing the purchase-money in Consols in the joint names of the vendor and purchaser, provided the investment was made by a certain day, and the purchaser made the investment accordingly:—*Held*, that the vendor, having proposed the investment, could not have charged the purchaser with the loss, if the funds had fallen, and that the vendor was entitled to the benefit accruing from the funds having risen. *Burroughes v. Browne*, 609

14. A purchaser cannot throw upon a vendor the risk of an investment of the purchase-money; and if he makes a payment to or on ac-

count of the vendor in respect of the purchase-money, the money paid becomes the property of the vendor, so that the purchaser can claim no benefit of any investment which the vendor may make. *Ib.*

15. The Court may not decree specific performance of a contract for the sale of a reversion, if the vendor had misled the purchaser by stating that it was subject to a lease containing all the usual covenants for repairs, &c., the vendor knowing, at the same time, that there was no person against whom the covenants could be enforced; but where property is sold subject to a lease so described, and tenants are in possession of the property, and pay their rent according to the terms of the lease, and the vendor is not aware, at the time of the contract, of any difficulty in enforcing the covenants, the Court will not refuse to decree specific performance, on the ground that the vendor cannot shew upon whom the liability of the covenants in the lease has devolved; and the vendor is not bound to find out, and acquaint the purchaser with, the name of the party who may be liable to such covenants.

*Flint v. Woodin*, 618

16. Though a puffer ought not to be employed to screw up the price, or take advantage of the ignorance of other bidders, yet a progressive bidding to a fixed or reserved bidding by a person employed by the vendor, without the knowledge of the other bidders, will not necessarily be deemed to be taking an advantage of their ignorance. *Ib.*

17. A party to a contract becoming aware of an objection to the validity of the contract, must forthwith state it as an objection on which he means to resist performance of the contract; or if, after such knowledge, he treats the contract as sub-

sisting, he will be considered to have waived the objection. *Ib.*

18. Though the auctioneer at a sale by auction is the agent of the purchaser, yet he is not his agent for all purposes; and there is no reason why he may not sell property of which he is himself the owner—*Semble*. *Ib.*

## VESTED LEGACY.

*See* LEGACY.

## VOLUNTARY DEED.

*See* FAMILY CONTRACT.

## WASTE.

1. The Court, by applying the doctrine of equitable waste, controls and restrains the excessive use of the legal power incident to an estate unimpeachable of waste, but with reference only to the presumed will and intention of the party by whom the power was created. *Marker v. Marker*, 1

2. In the preservation of ornamental timber, the protection of the Court is confined to timber planted and left standing for shelter or ornament; and the question, whether the protection should be extended to particular timber, is, therefore, one of fact, and the determination must depend upon the evidence which can be collected to establish the fact. *Ib.*

3. Where a tenant for life without impeachment of waste had sold a quantity of timber trees, which the Court afterwards restrained him from felling, on the supposition that it would be equitable waste, the Court held that the purchasers of the timber were not necessary parties to the injunction suit, but required the Plaintiff to give security to the Defendant, not only for the value of all the trees which the Defendant should be pre-

## WILL.

vented from cutting by the injunction, but also for any loss or damage the Defendant might incur or sustain by reason of his being prevented from completing the sale. *Id.*

## WILL.

1. Before the Court can resort to the context of a will, in search of a meaning for the words of a particular clause, it must be satisfied that the meaning of the clause is different from that which the words naturally import. *Walker v. Tipping*, 800

## YEAR'S WAGES. 891

2. Cases in which the Court, in construing a will of personalty, will look at the original will as well as the probate copy. *Oppenheim v. Henry*, 802, n.

## YEAR'S WAGES.

A legacy of a "year's wages" cannot properly be construed to mean the aggregate of the weekly wages of a servant for fifty-two weeks. *Blackwell v. Pennant*, 554

END OF VOL. IX.

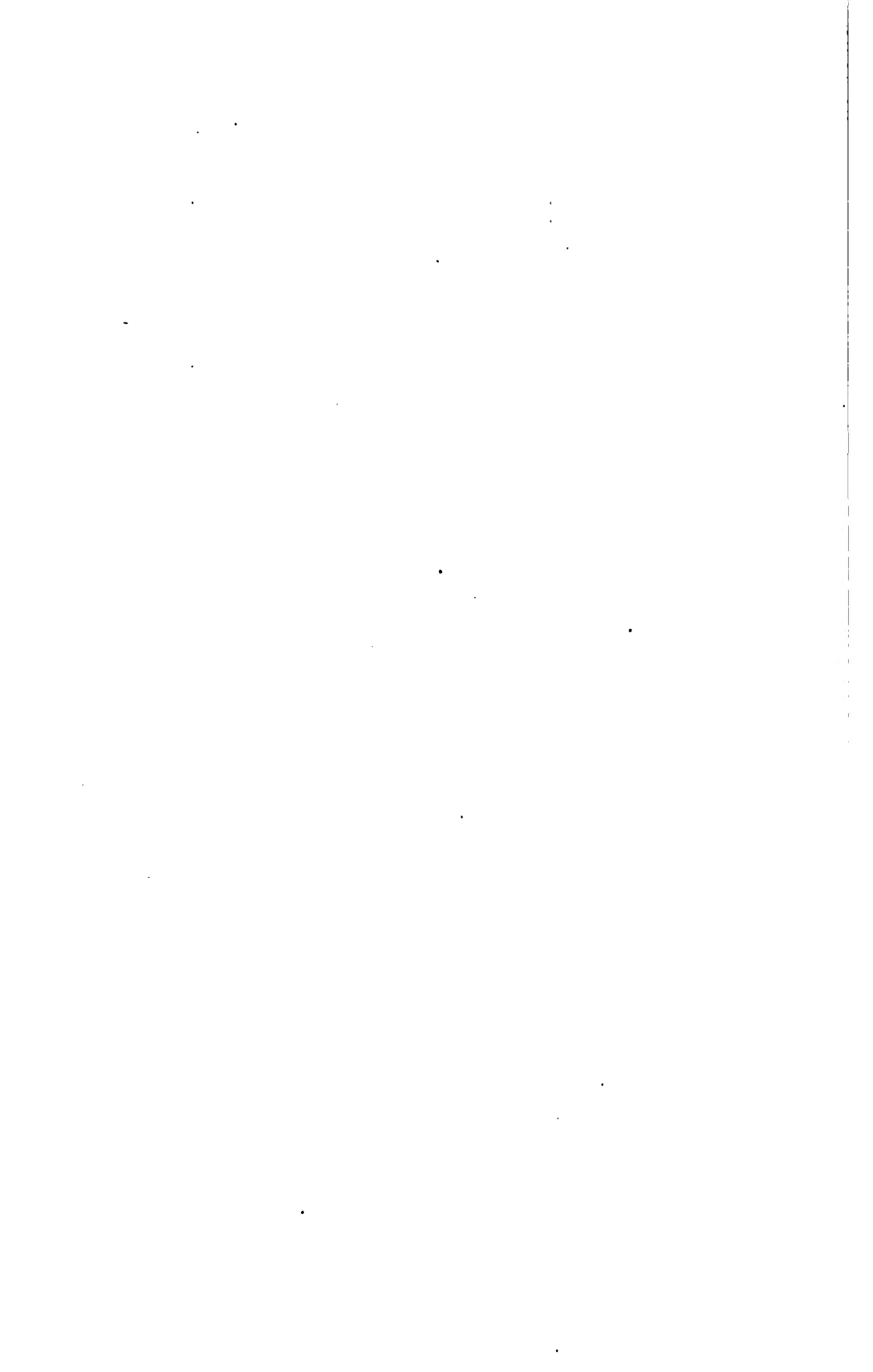
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